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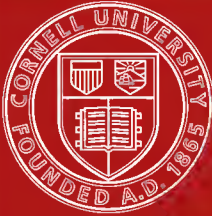
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Walker's Errors in Civil Proceedings

Being the Errors in Civil Proceedings which were held by
the Appellate Court to be insufficient to justify reversal
of the Judgment rendered by the Trial Court

Gathered from

The Printed Decisions of all the State
and Federal Courts

By
W. S. Walker,
Of the Cincinnati Bar

Author of The Law of Real Estate Agency, Errors in Criminal Proceedings, Ohio
Forms for Code Pleading, Ohio Justices Practice, Editor of 4th
edition of Wild's Journal Entries, etc., etc.

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P R E F A C E

When the material for this work was collected it was found advisable to separate the criminal from the civil practice, and a book comprising the former was first completed and published. Its reception by those of the profession interested in the trial of Criminal cases has been most satisfactory. An examination of the table of contents and of the index will reveal the numerous topics which are brought within the scope of the present work.

As "no compound of this earthly ball is like another, all in all," so, in the same way, no two opinions are exactly alike. Each judge sees the matter a little differently, his point of view differs. This produces that variety in expression and course of reasoning which is beneficial in its effect.

There are so many examples that it is difficult to summarize them. In fact, they include almost the entire gamut of civil practice,—pleading—jury—trial; everything that enters into a thorough knowledge of the practice of the law. By the experiences of others the jurist and the lawyer are enabled to avoid the errors which are so clearly and repeatedly pointed out, and to steer their respective courses correctly.

While it is not possible to compress all the rules of the decisions, and to summarily present the result in a few chosen examples; nevertheless, attention is called to some of the more important guides to an interpretation of the doctrines applied by appellate courts. Each state being a sovereign, its judicial rules and regulations paramountly prevail within its territory, save as federalistically limited; and therefore no direct agreement between

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the states will be found to exist; yet, on the whole, each and all seek the same end, the administration of equal and exact justice, without discrimination, every man being equal before the bar, which is the pride of our free and great American Nation. These interpretations are as follows:

1. With the possible exception of New Jersey, no distinction in reporting cases is maintained, and common law and equitable proceedings appear, without distinction, in the same volume.

2. In the State of Texas, in its Appellate Court, the Criminal cases are reported separately from the Civil proceedings.

3. In many of the states the pleadings are framed in accordance with the requirements of the Code, which was first adopted by the State of New York.

4. In other states the common law procedure, more or less modified, prevails.

5. A party must have exhausted his peremptory challenges before an exception taken to the selection of a jury or juror will be considered available to reverse. This extends even to cases where the jury was selected in a manner unauthorized by law, where the complainant is unable to show special injury suffered from the illegal proceeding.

6. To set aside a verdict for misconduct of the jury, it must have been gross and resulted in injury to the complaining party.

7. In some states the presumption is that every error is prejudicial, and it devolves upon the party, for whose benefit the error is assumed to be, to show, to the satisfaction of the reviewing court, that no prejudice to the substantial interests of the complaining party resulted therefrom.

8. In other states no error is presumed to be preju-

Preface.

dicial, and the burden is upon the complaining party to show that in consequence of the error complained of he has been injured in a substantial right.

9. Even in states where the presumption of prejudice from error exists, the reviewing court will examine the whole record, and, if satisfied that the complainant has not been substantially injured by the alleged error, the judgment rendered below will be affirmed.

10. Besides the rules of presumption, many of the states have, by legislation, provided that no judgment shall be reversed, except where the complainant has been prejudicially injured in some substantial right.

11. Where a cause is tried to the court, a jury being waived, greater indulgence is granted in relation to the evidence, and improper evidence admitted is held not to have been injurious, as well as the exclusion of proper, where if introduced to or withheld from a jury it might have been fatal.

12. Where a jury trial is merely advisory to the chancellor, error in the introduction of improper or the withholding of proper evidence is usually held to be harmless. Especially is this true, where sufficient proper evidence remains to sustain the finding, or that the evidence withheld could not have changed the result had it been admitted.

13. In some of the states withdrawing, striking out, or directing the jury to disregard improper evidence cures the error caused by its admission. In other states, in some cases the injury is deemed irreparable, it being held that the influence upon the minds of the jury is not dispelled by any of the means which, in other states, suffice to remedy the error.

14. Only in cases where injustice apparently results from the misconduct of counsel will a judgment be reversed for such cause.

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15. The reception of the verdict by the Clerk, while allowable in some states, is reversible error in others.

16. In perhaps a majority of the states exceptions to instructions must specifically point out the errors relied upon, and a general exception to the charge merely applies to it as a whole. In other states a general exception suffices to afterwards bring any error in the charge to the attention of the reviewing court.

17. The rule is quite general that appellate courts will not remand to enable the complainant to recover nominal damages, nor to correct an error in the computation of interest, nor even for failure properly to allow interest.

The foregoing constitute but a few examples of appellate law. The great riches of the volume are on tap for occasions. In the practice of every lawyer the need for this work is urgent and constant, to answer the many questions which almost daily present themselves. Here is a mine into which he can delve, as his need requires, to find precedents to fit his case. Especially is this true of the many practice questions that arise. The lawyer may be an excellent reasoner and present his position with the greatest clearness and force, and yet, after all, his eloquence will lack the effect which an effective applicable precedent presents to the court. Here is a mine teeming with examples which can be brought to bear whenever the occasion arises. It was that thought which prompted the gathering of this vast storehouse of appellate law, that with a thorough index, might be made immediately accessible to the wants of the profession. It is not, as is the case with most of the text books, devoted to one or more small branches of the law, but covers almost every conceivable question which may come up in the course of a varied practice asking for an immediate solution. It is therefore an indispensable assistant to the

Preface.

busy lawyer and should be at hand in his library. Although every state is somewhat distinct in its practice, in essentials they are all quite alike, and numerous questions may have been applicably answered in some states which for the first time arise in others.

There are many hints and suggestions that a skilful lawyer can perceive and make available. The occasion which sharpens the wits of counsel will enable him to perceive in this mine rich examples, clothed in suggestive significance, undetected by the casual eye.

While what has been said is true, as regards the trained lawyer, to a student or to a young lawyer just starting in the profession, here is a repository of the practice of the law for which he elsewhere will look in vain. With careful reading and rereading of this work he can familiarize himself with a practical knowledge of the law that will offset years of continuous, oftentimes bitter, experience. He can thus learn in a short time what otherwise would require the "buffets and rewards" of years of arduous practice to acquire.

These citations were carefully examined and compared and their accuracy may be relied upon. No effort has been spared to make the index thorough and complete, perhaps nearly every point being twice, sometimes oftener, indexed, so that if not found under one subject it will be found under another. Moreover, endeavor has been made to state each point in the index so completely that its full meaning may be grasped at once, and save unnecessarily referring to the case to find the point decided, with the consequent loss of time which that entails.

W. S. WALKER.

Cincinnati, June, 1917.

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ABBREVIATIONS

A. & E. Ann. Cas.	American & English Annotated Cases.
Abb. Ct. App. Dec.	Abbott's Court of Appeals Decisions, N. Y.
Abb. N. C.	Abbott's New Cases, various N. Y. Courts.
Affm'g.	Affirming.
Am. Dec.	American Decisions.
Am. Rep.	American Reports, Selected Cases.
Am. St. Rep.	American State Reports.
App.	Appeals.
App. Div.	Appellate Division, New York Supreme Court.
At.	Atlantic Reporter.
B. Mon.	Ben. Monroe's Reports, Kentucky.
Barb.	Barbour's Reports, Supreme Court, New York.
Black.	Blackford's Reports, Indiana.
Bosw.	Bosworth's N. Y. City Supreme Court Reports.
Brev.	Brevard's Reports, South Carolina.
C. S. C. R.	Cincinnati Superior Court Reports.
C. C. A.	United States Circuit Court of Appeals.
Call.	Call's Reports, Virginia.
Chand.	Chandler's Reports, Wisconsin.
Chy. App.	Chancery Appeals.
Cleveland O. L. Rep.	Cleveland Ohio Law Reporter.
Co.	County or Company.
Cr.	Cranch's U. S. Supreme Court Reports.
D. L. N.	Detroit Legal News.
Dist'g.	Distinguishing.
F.	Federal Reporter.
Fost.	Foster's Reports, New Hampshire.
Ga. Dec.	Georgia Decisions, Superior Courts.

Abbreviations.

Gil.....	Gilfillan's Reports, Minnesota.
Gild.....	Gildersleeve's Reports, New Mexico.
Gill & J.	Gill & Johnson's Reports, Maryland.
Gratt.....	Grattan's Reports, Virginia.
Harr.....	Harrison's Reports, New Jersey Law.
Heis.....	Heiskell's Reports, Tennessee.
Heming.....	Hemingway's Reports, Mississippi.
How.....	Howard's Reports, Mississippi.
How. Pr.....	Howard's Practice Reports, New York.
Humph.....	Humphrey's Reports, Tennessee.
J. & S.....	Jones & Spencer's Reports, N. Y. City Superior Courts.
J. J. Marsh.....	J. J. Marshall's Reports, Kentucky.
Ky. Dec.....	Kentucky Decisions, Sneed's Reports.
Ky. L. R.....	Kentucky Law Reports.
L. R.....	Law Reporter, Law Reports.
La. Ann.....	Louisiana Annual.
Lan.....	Lansing's Reports, N. Y. Supreme Court.
Martin, n. s.....	Martin's La. Reports, new series.
Mart. o. s.....	Martin's La. Reports, old series.
Metc.....	Metcalfe's Kentucky Reports.
Misc.....	Miscellaneous Reports, New York.
Mod.....	Modified.
N. E.....	Northeastern Reporter.
N. J. Eq.....	New Jersey Equity Reports.
N. J. L.....	New Jersey Law Reports.
N. W.....	Northwestern Reporter.
N. Y. Supp.....	New York Supplement.
O. C. C.....	Ohio Circuit Court.
O. C. C. n. s.....	Ohio Circuit Court, new series.
O. C. C. R.....	Ohio Circuit Court Reports.
O. C. D.....	Ohio Circuit Decisions.
O. Dec. n. p.....	Ohio Decisions, nisi prius.
O. Dec. Repr.....	Ohio Decisions, Reprint.
O. N. P.....	Ohio Nisi Prius.
O. N. P. n. s.....	Ohio Nisi Prius, new series
P.....	Pacific Reporter.
Penny.....	Pennypacker Supreme Court Reports, Pa.

Abbreviations.

Pick	Pickering Reports, Massachusetts.
Pin	Pinney's Reports, Wisconsin.
Rev. o. o. g.	Reversed on other grounds.
S.	Southern Reporter.
S. E.	Southeastern Reporter.
S. W.	Southwestern Reporter.
Scam	Scammon's Reports, Illinois.
Sergeant & R.	Sergeant & Rawle's Pa. Reports.
Shep.	Shepley's Reports, Maine.
Silver.	Silvernall's Reports, N. Y. Supreme Court.
Smedes & M.	Smedes & Marshall's Reports, Miss.
St. Rep.	State Reports, New York.
Stew.	Stewart's Reports, Alabama.
Strob.	Strobhart's Law Reports, South Carolina.
Sup.	Supreme.
Super. Ct.	Superior Court.
T. & C.	Thompson & Cook's Reports, N. Y. Supreme Court.
T. B. Mon.	T. B. Monroe's Reports, Kentucky.
Tenn. Chy. App.	Tennessee Chancery Appeals.
Ter.	Territory.
Tex. Civ. App.	Texas Civil Appeals.
W. O.	Without opinion.
Walk.	Walker's Reports, Mississippi.
Wall.	Wallace's U. S. Reports.
Watts & S.	Watts & Sergeant's Pennsylvania Reports
Weekly Dig.	Weekly Digest, New York.
Weekly Not. Cas.	Weekly Notes of Cases, Pennsylvania.
Wend.	Wendell's Reports, Supreme Court, New York.
White & W.	White & Willson's Reports, Texas Civ. Appeals.
Writ of cer. den.	Writ of certiorari denied.
Writ of error den.	Writ of error denied.
Writ of er. dis.	Writ of error dismissed.

ERRORS IN CIVIL PROCEEDINGS

CHAPTER I.

PREMATURE COMMENCEMENT OF ACTIONS.

- Sec. 1. Suit prematurely brought.
2. Proceedings of conciliation.

Sec. 1. . Suit prematurely brought.

- (a) *Suit prematurely brought and erroneous instruction not prejudicial to plaintiff.*

Plaintiff sued for supplies before maturity of the debt, alleging that the cause of action had accrued because of defendant's refusal to execute a chattel mortgage securing the same. Defendant denied agreeing to execute a chattel mortgage and pleaded that the suit was premature. Held, that an instruction that, if defendant agreed to execute a mortgage to plaintiff for the supplies, and plaintiff was ready to furnish the supplies, but defendant refused to execute the mortgage and to purchase further supplies, then its debt became immediately payable, and the verdict should be for plaintiff, though erroneous, was not prejudicial to plaintiff, since, if the action was premature, defendant was entitled to have it dismissed. *Jones v. Dyer*, 92 Ark. 460, 123 S. W. 757.

Sec. 2. Proceedings of conciliation.

- (a) *Failure to resort to the Mexican proceeding of conciliation before bringing suit will not reverse a judgment.*

Under the Mexican law, which formerly prevailed in this country, proceeding of conciliation was necessary before the institution of a suit in one of the established courts, and it seems that it was the proper and regular proceeding to be taken, even since the acquisition of the country by the Americans. The want of it, however, is to be regarded but as a formal or technical defect, which this court, on appeal, is authorized to disregard by the statute of Feb. 28, 1850, and the court will not reverse a judgment merely because the formality of conciliation has not been gone through with before commencement of the suit. *Von Schmidt v. Huntington*, 1 Cal. 55.

CHAPTER II.

PLEADINGS AND PARTIES.

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Sec. 3. Amendments.

(a) *Refusal to amend petition favorable to complaining party.*

In an action for injuries to a servant plaintiff alleged certain acts of negligence, and later offered to amend by alleging that he was ordered into the place where he was injured and went there under fear of punishment. The court rejected this amendment on the ground that it would introduce a new cause of action, and charged the jury that plaintiff could not recover by reason of being ordered into the place where he was injured, if he was injured from that cause alone, separate and apart from any other act of negligence. Held that, in so far as the case was affected the offer to amend, and by evidence which might have been introduced as to the act of negligence charged in the amendment, there was, in view of the instruction, no error of which defendant could complain. (Ga.) *Simonds v. Ga. Iron & Coal Co.*, 133 F. 776; judgment affd. 133 F. 1019, 66 C. C. A. 458; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806.

(b) *Refusal of amendment praying to have release set aside on account of fraud.*

Where defendants rely on a release, plaintiff may show that it was obtained by fraud or mistake, and having failed so to do, they are not prejudiced by a refusal to allow an amendment praying to have the release set aside on account of fraud. *Bunn v. Bartlett*, 54 Hun 639, 8 N. Y. Supp. 160.

(c) *Allegation of fact in reply instead of as an amendment to the petition.*

Though the allegation of a fact should have been in the reply, rather than as an amendment to the petition, it is immaterial, so long as an issue was made as to the fact and the parties allowed to present the evidence bearing thereon. *Insurance Co. v. Hargrove* (Ky. Ct. App.), 116 S. W. 256.

(d) *Admitting immaterial evidence cured by amendment of complaint.*

Error in the admission of immaterial evidence is cured by a subsequent amendment of the complaint before the close of the trial rendering the evidence material. *Curtis v. Aetna Life Ins. Co.*, 90 Cal. 245, 27 P. 211.

(e) *Allowing amended complaint to be filed without notice.*

Allowing an amended complaint to be filed without notice, is not ground for reversal where, for aught that appears, it should have been allowed had notice been given. *Baker v. R. Co.*, 114 Cal. 501, 46 P. 604.

(f) *Failure to obtain leave where amendment proper.*

Where it was asserted that the complaint in a suit on a note was amended without leave of court, by increasing the amount claimed, but it appeared that plaintiff was entitled to so amend, the judgment would not be reversed for failure to obtain leave. *Barnes v. Smith*, 34 Ind. 516.

(g) *Calling it supplemental, instead of an amended bill.*

Overruling a demurrer to a bill filed as a supplemental bill, based on the ground that it brought into the cause only such facts as should have been the subject of amendment, is not such error as will reverse a decree. Misnaming a bill could not have prejudiced defendants under such circumstances. *Hess v. Final*, 32 Mich. 515; *Howe v. Lemon*, 47 Mich. 544, 11 N. W. 379; *Osten v. Jerome*, 93 Mich. 196, 53 N. W. 7; *Bank v. Anderson*, 6 Wyo. 518, 48 P. 197.

(h) *Amending complaint by ex parte order.*

Error in amending a complaint by an ex parte order is not prejudicial, where the same amendment was subsequently allowed on a motion made on due notice. *Markel v. Ray*, 75 Minn. 138, 77 N. W. 788.

- (i) *Filing of amended petition making the heirs parties plaintiff.*

In an action to recover damages for injury to real estate, defendant having filed an amended answer during the trial alleging that plaintiff owned only a dower interest in the property, it was not prejudicial error to permit the filing of an amended petition making the heirs parties plaintiff, there being no motion to require an election. *Murray v. Booker*, 22 Ky. L. R. 781, 58 S. W. 788.

- (j) *Overruling demurrer to answer cured by defendant amending answer.*

The error, if any, in overruling a demurrer to an answer, in an action for partition which prays for the specific performance of an oral contract for the sale of land, is cured if defendant subsequently files an amended answer, in which he abandons his claim for specific performance and asks for repayment of the money paid by him as the price of the land. *Blackburn v. Blackburn*, 11 Ky. L. R. 161, 11 S. W. 712.

- (k) *Amendment after demurrer sustained.*

Error in sustaining a demurrer to a pleading is not available where it is cured by amendment. *Dickerson v. Turner*, 15 Ind. 4; *Whitely Malleable Castings Co. v. Bevington*, 25 Ind. 391, 58 N. E. 268.

- (l) *Complainant amending bill can not, on appeal, assign as error a ruling upon a plea to the original bill.*

If a complainant amends his bill so as to materially change its character, after a plea to it has been adjudged sufficient, he can not, on appeal, taken from a final decree rendered upon the case made by the amended bill, plea and answer, and replication thereto, and testimony, assign as error the ruling upon the plea to the original bill. *Howard v. R. Co.*, 24 Fla. 560.

(m) Error in allowing or rejecting amendments.

To justify reversal for error of the trial court in allowing or rejecting amendments, it must appear that prejudice resulted to the party complaining. (This does not appear to be so in this case.) *Guyer v. Minnesota Thresher Co.*, 97 Iowa 132.

(n) Where all evidence was heard on original that could have been heard on amended petition, defendant was not prejudiced by not answering latter.

Where the same cause of action alleged in the amended petition was tried on the original petition and answer, and both suits were heard upon all the issues that could have been joined on the amended petition, defendants were not prejudiced by having no opportunity to answer the amended petition. *Utley v. Tolfree*, 77 Mo. 307.

(o) Amendment of account sued on to show true amount of credits allowed.

In an action against a contractor and a surety on his bond for material furnished, it was not prejudicial error to allow the account sued on, and made a part of the pleading, to be corrected so as to show the true amount of credits allowed, where the error was induced by the contractor himself. *City of Kirkwood, ex rel.; Blackmer & Post Pipe Co. v. Byrne*, 146 Mo. App. 481, 125 S. W. 810.

(p) Amendment unaffecting issues or quantum of proof.

Prejudicial error can not be predicated of an order allowing a pleading to be amended, when the amendment does not change the issues, nor affect the quantum of proof as to any material fact. *Cate v. Hutchinson*, 58 Neb. 232, 78 N. W. 500.

(q) Amendment irregular and unnecessary.

In a suit against joint debtors, where one set up his co-

defendant's adjudication in bankruptcy, and during a stay of proceedings until final adjudication admitted the allegations of the complaint, and where, after final adjudication subsequently amended, set up the discharge in bankruptcy, dismissed as to the bankrupt, and, on default of the other defendant, took judgment against him. Held that, although the proceedings in allowing amendment were unnecessary and somewhat irregular, there was no injury to defendant, and no error in the judgment. *Doern v. O'Neale*, 6 Nev. 155.

(r) *Amendment to petition increasing the damages demanded.*

In an action for negligence causing death, pending at the adoption of the new constitution, an amendment was thereafter allowed increasing the damages demanded to an amount beyond the former statutory limit. Held that, as the amount recovered did not exceed the former limitation, this was not reversible error. *Burns v. R. Co.*, 15 Misc. 19, 171 State Rep. 864, 36 N. Y. Supp. 774.

(s) *Allowing amendment to pleading setting up a general usage or custom.*

The allowance of an amendment to a pleading setting up a general usage or custom, evidence of which is admissible, though not pleaded, is not prejudicial. *Ryder Gougar Co. v. Garretson* (Wash. Sup.), 101 P. 498.

(t) *Submission as though amendment had been allowed cured error in refusing same.*

Where, after an amendment to an answer is refused, the party asking for it is allowed to offer the evidence, and the issue is submitted to the jury as if the amendment had been made, such party is not prejudiced by the refusal. *Dozier v. Jerman*, 30 Mo. 216.

- (u) *Permitting plaintiff to amend declaration by adding the common counts.*

Where a referee allowed plaintiff to amend his declaration by adding the common counts, the error was harmless, it being found that plaintiff was entitled to recover only upon the original count in the declaration. *Morse v. Beers*, 51 Vt. 359.

- (v) *Error in allowing amendment of declaration cured by charge barring recovery if defendant were a minor.*

In an action on a note for goods sold, in which infancy was pleaded, error in allowing the declaration to be amended by averring that defendant fraudulently represented that he was eleven years of age, is cured by a charge that such representations will not authorize a recovery if defendant was an infant. *McKamy v. Cooper*, 81 Ga. 779, 8 S. E. 312.

- (w) *Allowing amendment changing date of note sued upon.*

The allowance of an amendment of a petition by changing the date of the note sued on, if error, is harmless, where the note would have been admissible in evidence if the amendment had not been made. *Rio v. Gordon*, 14 La. 418.

- (x) *A judgment will not be reversed because the court abused its discretion in allowing an amendment.*

A judgment on the merits of the case will not be reversed because the court abused its discretion in allowing an amendment to the complaint, without imposing terms, where it appears that the defendant had an opportunity to meet and defend against such amended complaint. *Silsby v. Frost*, 3 Wash. Ter. 388, 17 P. 887.

- (y) *Permitting material amendment after cause submitted on the evidence.*

Though it is error to permit a material amendment after

the cause has been submitted on the evidence, such error will not warrant a reversal where the amendment does not change the legal effect of the pleading. *Sharpe v. Dillman*, 77 Ind. 280.

(z) *Error in permitting amendments during the trial.*

Though it be erroneous to permit an amendment in the progress of a trial, if the merits are not affected the decree will not be reversed. *Dunn v. Dunn*, 24 Ky. (1 J. J. Marsh.) 585.

(a-1) *Failure to mature amended bill where original is broad enough to sustain decree.*

If, on appeal, it appears that the original bill is broad enough to admit the evidence and sustain the decree pronounced, the decree will not be reversed for failure to mature an amended bill unnecessarily filed. *Floyd v. Duffy* (W. Va.), 69 S. E. 993.

(b-1) *Error in permitting amendment of complaint increasing the ad damnum is harmless, where the recovery did not exceed the amount originally claimed.*

Any error in permitting an amendment of a complaint increasing the ad damnum is harmless, where the recovery did not exceed the amount originally claimed. *Newberry v. Lumber Co.*, 100 Iowa 441, 69 N. W. 743, 62 Am. St. Rep. 582; *Quint v. City of Merrill*, 100 Wis. 406, 81 N. W. 664.

(c-1) *Amendment allowed at the end of trial, praying for a money judgment in lieu of specific relief.*

Where, in an action to set aside a conveyance because of fraud, plaintiff was entitled to damages under his prayer for general relief, the allowance of an amendment at the conclusion of the trial, and before the referee's report was

filed, praying for a money judgment in lieu of specific relief, was not prejudicial to defendant. *Johnson v. Carter* (Iowa Sup.), 120 N. W. 320.

(d-1) *Plaintiff allowed to amend pleadings after trial, though court found for defendant.*

Where court allowed plaintiff an amendment to the pleading after trial, but before judgment; but afterwards found in defendant's favor on the issue involved, and, on defendant's appeal, plaintiff filed no crossbill so that the finding could be reviewed, the ruling as to the amendment was harmless, so far as defendant was concerned. *Chaves v. Torlina* (N. M. Sup.), 99 P. 690.

(e-1) *Permitting an amendment to conform pleading to the proof is within the discretion of the court.*

Where a defendant fails to demur to the sufficiency of a complaint, but moves for a dismissal thereof at the trial, the court's action in reserving the consideration of the motion until after a trial on the merits, and then permitting an amendment to conform the pleading to the proof, being a matter of discretion, will not be disturbed in the absence of injury to defendant's substantial rights. Judgment 61 N. Y. Supp. 155, 44 App. Div. 357, *affd.*; *Bank v. Rogers*, 166 N. Y. 380, 59 N. E. 922.

(f-1) *Amendment of complaint to correspond with the evidence.*

Where, in an action to enforce an agreement giving plaintiff the right to use the waters of a ditch on the land of another for purposes of irrigation, the complaint alleged that the agreement was made with a designated person, who at the time owned the land over which the ditch was dug, and the proof showed that another person was the owner and made the agreement with plaintiff, the permission to amend

the complaint to correspond with the evidence was not prejudicial. *Blankenship v. Whaley*, 142 Cal. 566, 76 P. 235; *Rawlose v. Dollman*, 100 Mo. App. 347, 73 S. W. 917; *Hunter v. R. Co.*, 22 Mont. 525, 57 P. 140; *Judd v. Small*, 107 Ind. 398, 8 N. E. 284; *Keck v. State, ex rel., Nat. Cash Register Co.*, 12 Ind. App. 119, 39 N. E. 899.

(g-1) *Amendment after verdict setting up a new issue.*

The discretion given by Revised Statutes, sec. 1042, to permit amendments of pleadings after verdict, should not be exercised where such amendment makes a new issue which has not been submitted to the parties, but the granting of the same will not be disturbed where it appears that the opposite party was not injured by such amendment. *Burt v. R. Co.*, 43 Fla. 339, 31 S. 265.

(h-1) *Refusal to permit the filing of an amended petition to correct a variance.*

Under Civil Code, secs. 129, 130, providing that a variance between pleadings and proof is not material, unless it misleads the opposite party to his prejudice, and that, if it be not material, the court may direct the fact to be found according to the evidence, and order an immediate amendment, the refusal to permit the filing of an amended petition averring that plaintiff's injury occurred in the first right side of the main entrance, when offered before the taking of evidence had progressed to any considerable extent, was error, but prejudicial only to plaintiff. *East Jellico Coal Co. v. Golden*, 25 Ky. L. R. 2056, 79 S. W. 291.

(i-1) *Amendment after verdict to cure a variance.*

The amendment of a complaint after verdict to cure a variance, which would not be ground for reversal, is harmless. *Matthews v. Town of Baraboo*, 39 Wis. 674.

(j-1) *Refusal of court to amend the findings so as to conform to the admitted facts.*

Refusal to amend the findings so as to conform to the admitted facts is erroneous, unless the findings as made is not detrimental to the party requesting the modification. *Boothe v. Bank* (Ore. Sup.), 98 P. 509.

(k-1) *Refusal of amendment, where allowed to introduce evidence as though same had been allowed.*

Refusal of amendment is harmless, where party was allowed to introduce all evidence which would be admissible under the proposed amendment. *R. Co. v. Purcell*, 77 Cal. 73, 18 P. 886; *Cox v. Allen*, 91 Iowa 462; *Hough v. Hansel*, 20 Iowa 19; *Tel. Co. v. Wisdom*, 23 Ky. L. R. 97, 62 S. W. 529; *Bank v. O'Connor*, 139 Mich. 82, 11 D. L. N. 742, 102 N. W. 280; *Bush v. Decoir*, 11 La. Ann. 503; *Hopkins v. State*, 53 Md. 502.

(l-1) *Erroneous refusal to amend answer.*

An erroneous refusal to allow defendant to amend his answer is harmless, if the evidence to be adduced under such amendment is immaterial. *Jones v. Block*, 30 Cal. 228; *State v. Keokuk*, 18 Iowa 388; *Reid v. Allen*, 18 Tex. 241.

(m-1) *Refusal of amended answer when interest of wife pledged for payment of note.*

In an action to foreclose a mortgage note by the wife to secure her husband's note, it appeared that, after making the mortgage, they gave an absolute deed of the land to secure a debt, and that on payment of the debt the land was reconveyed to the husband and wife jointly. Held, that it was not prejudicial to the wife to refuse an amendment to her answer setting up such facts, since whatever interest she had in the land was pledged to the payment of the debt. *Lane v. Bank*, 14 Ky. L. R. 873, 21 S. W. 756.

- (n-1) *Error in refusing amended answer is abandoned by plaintiff by his conceding sufficiency of original answer to put amendment in issue.*

Error assigned in refusing to permit the filing of an amended answer is properly abandoned on plaintiff conceding the sufficiency of the original answer putting in issue the matter sought to be raised by the amendment. *Smith v. Lurty*, 108 Va. 799, 62 S. E. 789.

- (o-1) *Denial of unnecessary amendment to complaint.*

It is not reversible error to deny an unnecessary amendment to the complaint. *Stenson v. Elfman* (S. D. Sup.), 128 N. W. 588.

- (p-1) *Denial of leave to defendant to amend its answer to show that former suit of wife was brought on behalf of herself and husband, with his consent and knowledge.*

Where a husband sued for injuries to his wife received from a street railroad's negligence, and defendant set up the pleadings in a former action by the wife for the same injuries, claiming that such action had been settled by defendant's paying the husband and wife a certain sum in satisfaction of their demands, to which plaintiff replied denying that the money was paid in satisfaction of his claim, the denial of defendant's motion for leave to amend its answer so as to allege that the former suit of the wife was brought on behalf of herself and husband, with his consent and knowledge, was without prejudice, as such amended answer would not tender any new issue, and no evidence was rejected because of the absence of such proposed allegation. *Denver Consol. Tramway Co. v. Riley*, 14 Col. App. 132, 59 P. 476.

(q-1) *Refusal of leave to amend, but case tried on theory of amended answer.*

Defendant is not injured by refusal of leave to amend, when case is tried on theory set forth in the amended answer. *Shadburne v. Daly*, 76 Cal. 357, 18 P. 403.

(r-1) *Refusal of leave to amend a complaint in ejectment so as to set up a claim for rent.*

The refusal of leave to amend a complaint in ejectment so as to set up a claim for rent is harmless error, where complainant was unable to sustain his claim of title to the land. *Butler v. Gosling*, 130 Cal. 422, 62 P. 596.

(s-1) *Refusing amendment to paragraph of complaint.*

It is harmless error to refuse an amendment to a paragraph of the complaint, where the relief sought by the amendment was granted under another paragraph. *Cromer v. City of Logansport*, 38 Ind. App. 661, 78 N. E. 1045.

(t-1) *Rejection of insufficient amendments.*

Where a demurrer has been sustained to an amended petition, and plaintiff offers other amendments which are rejected, and final judgment is rendered on a demurrer, such action, although technically wrong, is harmless, where the amendments offered were entirely insufficient and in no way aided the petition. *Wilkinson v. Goodin*, 71 Mo. App. 394.

(u-1) *Refusal of leave to file amended answer.*

An action was brought on a foreign judgment. The defendant pleaded matter by way of setoff or counterclaim, which was, on motion, stricken from the answer, and the court refused leave to file an amended answer containing the same matter. The transcript of the proceedings lead-

ing to the judgment sued on was, on the trial, introduced in evidence and disclosed an adjudication adverse to the defendant's of all the matters so stricken out. Held, that the rulings on the pleadings whereby the defendant was prevented from alleging such matters, if erroneous, were not prejudicial to the defendant. *Lonergan v. Lonergan*, 55 Neb. 441, 76 N. W. 16.

(v-1) *Allowing a sheriff to amend a description of land sold on execution.*

In ejectment by one claiming under an execution sale, allowing the sheriff to amend his return of execution by inserting a more particular description of the land is not prejudicial to a defendant, where the latter does not claim under the execution debtor. *Tyler v. Green*, 28 Cal. 406, 87 Am. Dec. 130.

Sec. 4. Answers or pleas.

(a) *Admission of defendant's abandoned answer.*

In an action on notes, where the defense was forgery, and the jury was limited to that question alone, the admission of the abandoned answer of defendant, wherein defendant set up want of consideration, was not prejudicial error. *Sanders v. North End Building Ass'n*, 178 Mo. 674, 77 S. W. 833.

(b) *Special pleas rejected, being allowed to make same defense under his general denial.*

Where, to a declaration on a bond, the plea of non est factum was interposed, together with special pleas setting up defenses which were also available under the general issue, and the record shows that defendant introduced evidence pertaining to the special defenses under the general issue, it was not error to reject the special pleas. *Blankenship v. Ely*, 98 Va. 359, 36 S. E. 484.

(c) *Allowing an improper party to file an answer.*

A decree will not be reversed for allowing an improper party to file an answer, where the error was not prejudicial. *Hamilton v. McKinney*, 52 W. Va. 317, 43 S. E. 82.

(d) *Overruling plea, where all facts under it are provable under another.*

Overruling a plea can not be a fatal error, where all the facts provable under it were provable with the same effect under another plea on which the case went to trial. *Kent v. Halliday*, 17 Md. 387; *Lyon v. Taylor*, 49 Ill. App. 639; *Consolidated Coal Co. v. Block & Hartman Smelting Co.*, 53 Ill. App. 565; in the two latter cases the evidence being admissible under the general issue.

(e) *Disregarding plea in abatement and trying on the merits.*

Where defendant in attachment pleaded in abatement of the attachment, and before the disposition of that plea pleaded also on the merits, and the trial court, under an erroneous impression as to the effect of the latter plea, regarded it alone to be tried, the judgment on the merits need not necessarily be reversed because of the error touching the rejection of the plea in abatement of the defendant. *Coombs Commission Co. v. Block*, 130 Mo. 668, 32 S. W. 1139.

(f) *Answer stricken out, but defendant allowed to put in evidence as if filed.*

Where an answer has been stricken out, but the defendant has been permitted to put in his evidence as if it remained, even if the order striking out the answer was erroneous it was harmless error. *County of Nemaha v. Frank (Neb.)*, 120 U. S. 41, 30 L. ed. 584.

(g) *Where the court erroneously sustained defendant's demurrer to a part of an item of account sued for, but no judgment was entered, and defendant answered, without objection by plaintiff, and the case was tried on the answer.*

After the court had erroneously sustained defendant's demurrer to a part of the items of the account sued for, no judgment was entered on the order, and defendant answered without objection by plaintiff, but without leave of court or a vacation of such order, and the case was tried on the answer. Held, that plaintiff was not harmed by the irregularity. *Nelson v. Merced County*, 122 Cal. 644, 55 P 421.

(h) *Holding paragraph of answer bad.*

Where, in an action on a bond, a paragraph of the answer was a mere argumentative denial of the cause of action on the bond, and was embraced in a general denial pleaded in the first paragraph of the answer, a ruling declaring it bad, even if erroneous, was harmless. *Wilson v. Town of Monticello*, 85 Ind. 10.

(i) *Where complaint is bad, immaterial whether answer is good or bad.*

Where a complaint is bad, it is immaterial whether the answer is good or bad, and plaintiff can not allege as error the overruling of a demurrer to such answer. *Vert v. Voss*, 74 Ind. 565; *City of Delphi v. Hamling*, 172 Ind. 645, 89 N. E. 308.

(j) *General exception to answer as containing inconsistent defenses, insufficiently definite.*

An exception to an answer which only alleges, in general terms, that the answer contains inconsistent defenses, making no specifications whatever of the defenses supposed to be inconsistent, should be overruled. It is not the duty of the

court before which such vague and indefinite exception is filed to devote itself to the task of ascertaining the particular defenses which the pleader regards as inconsistent with each other. *Peck v. Osteen*, 37 Fla. 427.

(k) *Absence of plea from the record a matter of form.*

Since Annotated Statutes of the Act of 1852, ch. 152, secs. 4 and 5, which provides a change, was incorporated into the Code, secs. 2865, 2866, 2872, 2873, the want of a plea in the record brought up by the writ of error is regarded as a matter of form, for which the judgment of the court below will not be reversed. The supreme court will, if necessary, upon the record transmitted, presume that there was a proper plea and issue, and that its omission from the record is a mere clerical error which does not touch the merits of the case. *Cornelius v. Merritt*, 39 Tenn. (2 Head) 97, 98; *Groot v. Jennings*, 1 Coldwell (Tenn.) 54.

Sec. 5. Bill of particulars.

(a) *Ad damnum increased beyond the amount called for in the bill of particulars.*

If the ad damnum is permitted to be increased beyond the amount called for in the bill of particulars, it is not error which will reverse for the court to refuse to order a new bill of particulars, the merits of the controversy not being affected, and the verdict for a sum less than that called for in the bill of particulars. *Moon v. Varian*, 147 Ill. App. 383.

(b) *Improper item for extra work in bill of particulars, disallowed in verdict on contract by jury.*

Where, in a complaint on a special contract, the plaintiff erroneously incorporated in the bill of particulars an item for extra work, the error was harmless, where the item was disallowed by the jury. *Killian v. Eigenmann*, 57 Ind. 480.

- (c) *Allowing complaint and verified bill of particulars to be taken to the jury room.*

In an action for goods sold, the fact that the jury took to their room the complaint, with which was filed a verified bill of particulars, at the end of which bill was a memorandum of the interest due, was not reversible error where the jury found for the proper amount of interest. *Haas v. C. B. Cones, etc.*, 25 Ind. App. 469, 58 N. E. 499.

- (d) *Too late in appellate court to object to defective bill of particulars.*

Where the bill of particulars attached to the declaration is general, and does not state any particular articles sold to defendants by plaintiffs, and the defendants did not make any objections to the bill of particulars in the trial court, they will not be heard to raise objections thereto in the appellate court. *Butler Bros. v. Ederheimer*, 55 Fla. 544.

Sec. 6. Complaint, petition, declaration, etc.

- (a) *Declaration not averring value of foreign money.*

In an action of debt for foreign money, a verdict and finding of the value of the money cures defect in the declaration in not averring its value. *Brown v. Barry*, 3 Dallas (U S.) 365, 1 L. ed. 638.

- (b) *Allegation in petition that defendant's drain pipe was a "death trap."*

An allegation in a petition that defendant maintained over a drain pipe in one of its streets a grate which was a "death trap," though improper, was not reversible error in a personal injury case, where the verdict was not excessive, and the record did not show that the jury was influenced thereby. *City of Dallas v. Webb*, 22 Tex. Civ. App. 48, 54 S. W. 398.

(c) *Where petition had objectionable averments, but not objected to at the trial, nor instructions asked.*

Where a complaint stated a good cause of action for the maintenance by defendant of stock pens near plaintiff's premises, but contained averments of damages from the driving of cattle along the streets to the pens, and for the language used by the drivers, for which defendant might not have been liable, and objections to these averments were not followed up by objections to the evidence, and it appeared from the instructions that this feature did not enter into the consideration of the jury in arriving at a verdict for plaintiff, the judgment will not be reversed. *R. Co. v. McGehee* (Tex. Civ. App.), 75 S. W. 841.

(d) *Uncertainty of complaint insufficient where defendant was not misled to his injury.*

A judgment will not be reversed upon appeal for uncertainty of complaint alone, where answer and trial showed that defendant could not have been misled thereby to his injury. *Williams v. Cesebeer*, 126 Cal. 77, 58 P. 380.

(e) *Where complaint was in the alternative, objection to the sufficiency on one ground.*

Where a complaint prayed in the alternative, for rescission of contract or for damages for deceit, and there was a verdict for damages only, an objection to the sufficiency of the complaint as a complaint for rescission is unavailable. *Mills v. Winter*, 94 Ind. 329.

Sec. 7. Contributory negligence.

(a) *Finding defendant not negligent, question of contributory negligence immaterial.*

Where the jury have determined that the defendant was not negligent, the question of contributory negligence is immaterial. *Rehearing denied*, 130 Mich. 51, 89 N. W. 554,

8 D. L. N. 1139; Scheel v. City of Detroit, 130 Mich. 51, 90 N. W. 274, 9 D. L. N. 107.

(b) *Errors in the trial immaterial, plaintiff being guilty of contributory negligence.*

Where, on the conceded facts, plaintiff was guilty of contributory negligence, as a matter of law a judgment for defendant will be affirmed regardless of errors at the trial. Wheeler v. Wall (Mo. App.), 137 S. W. 63.

(c) *Erroneous charge as to contributory negligence.*

Appellant can not complain of erroneous remarks as to contributory negligence made by the judge to the jury, where the jury found appellant was not guilty of such negligence. Marcott v. R. Co., 49 Mich. 99, 13 N. W. 374; Welden v. Brush Elec. Light Co., 73 Mich. 268, 41 N. W. 269; Ind. Union Traction Co. v. Ohne (Ind.), 89 N. E. 507; R. Co. v. Steinberger, 60 Kan. 856, 55 P. 1101; affm'g 6 Kan. App. 585, 51 P. 623; R. Co. v. Chamberlin, 61 Kan. 859, 60 P. 15.

(d) *In an action for injuries to automobile by collision, instruction that an act or omission must contribute to the happening to be contributory negligence.*

Where, in an action for injuries to an automobile in a collision at a railroad crossing, there was no suggestion that the entire damage to the automobile was not caused solely by the collision, defendant was not prejudiced by an instruction that the act or omission must contribute, in order to be contributory negligence, to the happening of the act or event causing the injury, and that if the act or omission merely increases or adds to the extent of the loss or injury, it will not have that effect. Pendroy v. R. Co. (N. D. Sup.), 117 N. W. 531.

- (e) *Instruction containing the word "contributory" before negligence, in referring to the negligence of defendant.*

Though an instruction submitting the questions of contributory negligence and negligence contains the word "contributory" before the word "negligence," in referring to the negligence of defendant, it was a mere verbal inaccuracy, and will not furnish a ground for reversal. *Wellington v. Reynolds* (Ind. Sup.), 97 N. E. 155.

- (g) *Instruction upon contributory negligence, not in issue.*

Where the evidence did not raise an issue on contributory negligence, an erroneous instruction on such subject was harmless. *Carver v. Luverne Brick & Tile Co.* (Minn. Sup.), 141 N. W. 488.

- (h) *In action for personal injuries, inaccurate instruction where, instead of contributory negligence, court said, "This would not render defendant liable."*

In an action against a railroad company for personal injuries from stepping on a spike in a plank left exposed by defendant's servants in repairing a station platform, while an instruction that if plaintiff came out of the house and stepped upon the nail, without looking to see where he was stepping, this "would not constitute negligence that would render defendant liable," but would have better expressed the issue had it stated that the facts recited would constitute contributory negligence on the part of the plaintiff, yet the inaccuracy was harmless, plaintiff having admitted that he did not look to see where he was stepping. *Hanna v. R. Co.* (Ark. Sup.), 124 S. W. 514.

- (i) *Abstract instruction on the question of contributory negligence.*

Where there is no evidence of contributory negligence in

a personal injury action, an abstract instruction on that issue is not prejudicial to plaintiff. *Davis v. Catlettsburg K. & C. Water Co.* (Ky. Ct. App.), 127 S. W. 479.

(j) *Instruction that defense of contributory negligence must fail unless established by defendant's own testimony, cured by other instructions.*

An instruction that the defense of contributory negligence must fail unless established by defendant's own testimony, though erroneous, is not prejudicial, where the jury were fully instructed as to what would constitute contributory negligence preventing recovery, and were told to consider all the evidence in determining this question. *R. Co. v. Bentley* (Kan. Sup.), 93 P. 150.

(k) *Charge erroneously considering absence of fence contributory negligence.*

There being no statute requiring a railroad company to fence its track for the prevention of personal injuries, a charge, in an action for injuries to a child, that if a fence would have prevented such injury, it was negligence not to have provided it, was not prejudicial to plaintiff. *Marcott v. R. Co.*, 49 Mich. 99, 13 N. W. 374.

(l) *Instruction confounding contributory negligence and assumed risk.*

Where, in an action for the death of an employee, the jury found that decedent was not guilty of contributory negligence, and had had no knowledge of the risk, defendant was not harmed by the fact that the court in its instructions erroneously confounded contributory negligence and assumed risk. *Shattuck's Adm'r v. R. Co.*, 79 Vt. 169, 65 A. 529; *Burgess v. Humphrey Book Case Co.*, 156 Mich. 345, 120 N. W. 790, 16 D. L. N. 112.

(m) *Where evidence shows plaintiff free from negligence, failure to instruct upon contributory negligence.*

In an action by a passenger for personal injuries, when defendant is shown to have been negligent, but there is no evidence that plaintiff was so, failure of the court to instruct the jury on the subject of contributory negligence is without prejudice. *Flanagan v. R. Co.*, 83 Iowa 639, 50 N. W. 60.

(n) *Refusal to charge as to contributory negligence where jury found no signal for the crossing was given.*

Refusal to charge that it was negligence to drive upon a railroad crossing until a train on the east bound track had moved far enough from the crossing so that its noise would not interfere with hearing the bell or whistle of an engine approaching on the west bound track, was harmless where the jury found that no signal was given for the crossing. *Boyden v. R. Co.*, 72 Vt. 89, 47 A. 409.

(o) *Failure of the court to charge on contributory negligence was not prejudicial.*

A charge that an employee of an electric company may not recover for injuries, if he was guilty of contributory negligence, is not prejudicial to the company for failing to charge on contributory negligence, as provided by General Laws, 1909 (1st ex. sess.), c. 10, declaring that contributory negligence of an employee shall not bar a recovery, but the damages shall be diminished. *R. Co. v. Shaklee* (Tex. Civ. App.), 138 S. W. 188.

(p) *Plaintiff's failure to reply to plea of contributory negligence confessed its truth.*

Where an answer, in an action for injuries, contained a plea of contributory negligence and a plea of previous adjudication, an order overruling a motion to strike out the latter plea is immaterial, where the plaintiff expressly de-

clined to reply to the plea of contributory negligence, since such refusal was a confession of the latter plea. *Plefka v. Knapp-Stout & Co.*, 166 Mo. 7, 65 S. W. 1001.

(q) *Immaterial that answer contained plea of contributory negligence when not submitted to the jury.*

Whether the answer contained a plea of contributory negligence is immaterial, where this issue was not submitted to the jury. *McDonald v. Metropolitan St. Ry. Co.*, 219 Mo. 468, 118 S. W. 78.

Sec. 8. Corporations.

(a) *Exclusion of the charter and bylaws of a corporation on issue of authority of the general manager.*

Exclusion of the charter and bylaws of a corporation as evidence on the issue of the general manager's authority, while erroneous, is not ground for reversal where the charter and bylaws do not limit the general manager's authority. *Monross v. Uncle Sam Oil Co.*, 88 Kan. 237, 128 P. 385.

(b) *Agent of corporation denying a servant's authority to make admissions adverse to the employer's interests.*

If an agent of a corporation, having charge of an inferior servant thereof, testified denying the servant's authority to make admissions adverse to their employer's interests, the error, if any, was not prejudicial, where it clearly appears, independently of such denial, that no such authority was vested in the servant. *Sheridan Coal Co. v. C. W. Hull Co.* (Neb. Sup.), 127 N. W. 218.

(c) *Excluding minutes of corporation, where facts otherwise established.*

That the book of minutes of a corporation was excluded as evidence is harmless, the facts which they were offered to

prove having been established by other evidence. *City of Conyers v. Kirk*, 78 Ga. 480, 3 S. E. 442.

(d) *Exclusion of evidence as to subscriptions to stock, where evidence of all the facts was before the court.*

The exclusion of evidence tending to show that a subscription to the stock of a corporation was not made after the license to open books therefor, is harmless, where the evidence of all the facts in that respect was before the court. *Kern v. Chicago Co-op. Ass'n*, 140 Ill. 371, 29 N. E. 1035; *affm'g* 40 Ill. App. 350.

(c) *Court improperly calling, in its charge, a certificate by a municipal officer an admission by the corporation.*

The fact that the court, in its charge, called a certificate by a municipal officer an "admission" by the corporation, when in fact he had no authority to bind the corporation, is harmless error, where the certificate is shown to have been made on the statement of one who testified as to the basis of the statements, and that he believed them to be correct. *Genovese v. City of New York*, 55 N. Y. Super. Ct. (23 Jones & S.) 397.

(g) *Instruction that one of the parties being a corporation should not affect the minds of the jury.*

A party can not complain of an instruction, in an action for injuries to a passenger against a street railroad company, that the fact that one of the parties is a corporation should not affect the minds of the jury, in the absence of a showing that he is prejudiced thereby. *Feary v. R. Co.*, 162 Mo. 75, 62 S. W. 452.

(h) *Where both corporations were owned by the same persons, under the same management, instruction authorizing joint judgment against both.*

Where both defendant corporations were owned by the

same persons and were under the same management, an instruction authorizing a joint judgment against both, under certain circumstances, was not prejudicial because of evidence indicating that the injury resulted from their separate wrongful acts. *Pealer v. Gray's Harbor Boom Co.*, 54 Wash. 415, 103 P. 451.

- (i) *In an action for breach of contract to transfer stock, instruction that stock of the corporation was liable for bona fide debts of the corporation.*

Where, in an action for breach of contract binding defendant to transfer to plaintiff certificates of shares in a corporation representing one-sixth thereof, the plaintiff demanded the value of the stock, which defendant refused to transfer, a charge that stock of the corporation was liable for the bona fide debts of the corporation, and the value of the stock might be affected by the debts of the corporation, was not prejudicial to defendant, on the ground that the debts must be paid out of the assets before any part thereof could be used for the redemption of the stock. *Markle v. Burgess* (Ind. Sup.), 95 N. E. 308.

- (j) *Finding defendant to be a foreign corporation was immaterial.*

Under a declaration charging defendant as a foreign corporation doing business in this state, without averring whether they were incorporated or not, where the making of the contract counted upon and the fact that they were a foreign company doing business here are, in effect, admitted on the trial, and the right to recover is in no way made to hinge at all upon the fact of incorporation, a finding that the defendants were a foreign corporation, though unsupported by any evidence, is immaterial. *Earle v. Insurance Co.*, 29 Mich. 414.

Sec. 9. Counterclaim, cross-bill.

- (a) *Excluding evidence for counterclaim where jury found there was no ground for same.*

In an action to recover for work done under a contract for the alteration of a building, the work having been accepted by an order of the city superintendent of buildings, because of a defect in one of the walls defendant set up a counterclaim, the expense incurred in taking down and rebuilding the wall, alleging that the defect was caused by the negligent acts or omissions of plaintiff. The court excluded the evidence of the expenses so incurred, and charged the jury that if the delay was so caused by plaintiff he could not recover. Held, that the exclusion of the evidence was harmless, as the finding of the jury for plaintiff showed that there was no ground for the counterclaim. *Heine v. Meyer*, 61 N. Y. 171.

- (b) *Restricting proof of damages under counterclaim, where defendant fails to prove allegations thereunder.*

In an action for rent, error in restricting proof of damages under a counterclaim by defendant for fraud in procuring the lease, and for the lessor's breach of his warranties and of an agreement to repair, is harmless when defendant fails to prove the allegations of such counterclaim. *Gulliver v. Fowler*, 64 Conn. 556, 30 A. 852.

- (c) *When same matter set up as constituting counterclaim and contributory negligence, excluding evidence on the counterclaim.*

In an action for damages by an adjacent owner for excavating too near plaintiff's building, where the same subject matter was set up in the defense as constituting a counterclaim and also contributory negligence, and evidence was given, without objection, on contributory negligence, on

which the finding was against defendant, it was harmless to exclude evidence on the counterclaim, as the facts having failed to constitute contributory negligence they would not constitute a counterclaim. *Curr v. Hundley*, 3 Col. App. 54, 31 P. 939.

(d) *Overruling demurrer to answer does not justify reversal of judgment for C. on the counterclaim.*

In an action against C. M. & P. for freight for transporting horses under a contract made with C., a pleading by defendant reciting: "Defendants, each for himself," for an answer and by the way of counterclaim alleges, etc., an answer showing that M. & P. are not liable for the freight, and a prayer for damages in favor of C., and by the words, "and defendants each pray judgment against," etc., is, in substance, a counterclaim of C., and an argumentative denial of M. & P., and though offensive, the overruling of a demurrer to it does not justify a reversal of the judgment for C. on the counterclaim. *R. Co. v. Rudy* (Ind.), 89 N. E. 951.

(e) *Refusing permission to file counterclaim.*

A refusal by the court to allow defendant to file an answer setting up a counterclaim for rent of a house, if erroneous, is harmless, where it is shown on the trial that the house belonged to plaintiff and not to defendant. *Robbins v. Sackett*, 23 Kan. 301.

(f) *Plaintiff can not complain of refusal to dismiss counterclaim and set-off, when no judgment given thereon.*

Plaintiff's executors can not complain of the refusal of the court to dismiss defendant's counterclaim and set-off for want of proper verification and proof, where no judgment has been rendered over against plaintiffs thereon. *Grover's Executors v. Tingle*, 21 Ky. L. R. 835, 53 S. W. 281.

(g) Failure to strike out counterclaim.

Where defendants specially pleaded as a defense by way of counterclaim, and it was apparent that the counterclaim did not entitle defendants to affirmative relief, the court so finding, the error in refusing to strike it out, if any, was harmless. *Dwyer v. Rohan*, 99 Mo. App. 120, 73 S. W. 384.

(h) Error in striking out counterclaim.

In a proceeding to foreclose a mechanic's lien, the error, if any, in striking out a counterclaim for a demand for board furnished plaintiff in the course of the work, was not prejudicial, where the finding as to the value of plaintiff's services was, as to their value over and above his living expenses while in attendance at the place where the services were rendered, so that defendant, in fact, had the benefit of the defense. *Thien v. Brand*, 142 Wis. 85, 124 N. W. 999.

(i) When defendant not entitled to verdict on his counterclaim.

Although the verdict of the jury against a defendant's counterclaim, in an action for damages, be wholly contrary to the evidence, it is not ground for a new trial or reversal unless it is prejudicial to him; and it is not prejudicial if he has no right to plead the damages claimed by him as a counterclaim. *Ward v. Blackwood*, 48 Ark. 396.

(j) Objection that reply to counterclaim contains inconsistent defenses is immaterial, if but one is submitted to the jury.

The objection that a reply to a counterclaim contains inconsistent defenses will not be considered on appeal, if only one defense was relied on and submitted to the jury. *Kerslake v. McInnis*, 113 Wis. 659, 89 N. W. 895.

(k) *Refusal to instruct that set-off or counterclaim was admitted by failure to reply.*

A sued B to recover for work done for the latter. The defense was that the alleged work was improperly done and was valueless, and claimed by way of a counterclaim a sum advanced to A during the progress of the work and allowed as a credit in the account filed with plaintiff's petition. To this counterclaim no reply was filed. The court, at B's instance, instructed the jury that, if the sum advanced by B was more than the work done was worth, they should "find for defendant whatever amount they might consider said work worth less than that sum." Held, that defendant was not, under the circumstances, grieved by the refusal to instruct the jury that the allegations of the answer, with respect to the set-off or counterclaim, were admitted by the pleadings to be true, there being no reply thereto. *Irvin v. Riddlesberger*, 29 Mo. 340.

(l) *Failure to submit counterclaim to the jury.*

Defendant is not prejudiced by the failure to submit to the jury a counterclaim, which is a mere repetition of alleged damages set up by way of recoupment, as to which the court charged that defendant might recoup from the plaintiff out of the sum claimed, and the jury found the defendant was not entitled to recoup for any sum. *Philip Schneider Brewing Co. v. American Ice Machine Co. (Col.)*, 77 F. 138, 23 C. C. A. 89.

(m) *Instruction for jury to find on counterclaim.*

Where, in an action to recover the value of services rendered and improvements made on the farm by the son for his father, the father asserted a counterclaim against the son for money paid by him for the son, an instruction that the jury might find for the defendant, on his counterclaim, such balance, if any, as might be shown to be due, after deducting such amounts as might have been paid by plain-

tiff to defendant or put on the farm in improvements, with the consent and agreement of defendant, was not prejudicial to plaintiff. *Elliott v. Elliott*, 15 Ky. L. R. 274, 23 S. W. 216.

(n) *Where damages are not claimed, defective notice of recoupment will not be considered.*

Where no damages are claimed, the error on a trial under a notice of recoupment, which is claimed to be too defective to admit of recouping damages thereunder, it is unnecessary to consider the question raised by such claim. *Schuler v. Eckert*, 90 Mich. 165, 51 N. W. 198.

(o) *Erroneous charge upon recoupment.*

Defendant, in an action for balance of contract price of constructing a bath-house, is not harmed by an instruction that if there had been an acceptance there could be no recoupment, and there could be a recoupment only if recovery was on a quantum meruit alone, where the court instructed that plaintiff could not recover on the contract unless he had faithfully performed the contract and defendant had accepted the work, and that, if plaintiff sought to recover on the quantum meruit, there might be a recoupment, even if defendant was entitled, as charged, to recoup, instead of bringing an action on his bond for any breach of plaintiff's guaranty of the work for five years, with agreement. on notice, to replace any injured tiles, where the jury must have found that plaintiff had not refused or neglected, after notice, to perform its obligation under the guaranty. *Mosaic Tile Co. v. Chiera*, 133 Mich. 497, 10 D. L. N. 278, 95 N. W. 537.

(p) *Sustaining demurrer to cross-bill, where the court treated the allegations as in the case.*

Defendant is not injured by sustaining a demurrer to a cross-bill, where it appeared that the court treated the al-

legations thereof as before it, applying the evidence to them; held, that they were not sustained. *Lloyd v. Preston*, 146 U. S. 630, 36 L. ed. 1111.

(q) *Striking cross-bill from files, with right to apply to court for leave to file.*

The order striking the cross-bill of appellant from the files, reserving leave to him to apply to the court for leave to file a cross-bill. He never made any such application, but after replication filed to the answer of himself and of the other defendants, suffered proof to be taken upon the issues so made up, and the case to proceed to a final decree, and the final decree is expressed to be made without prejudice to his right as receiver. Held, that, under these circumstances, there was nothing in the proceedings of the court below prejudicial to those rights, or which entitled him to a reversal of the final decree, and to a reopening of the whole case. *Close v. Glenwood Cemetery*, 107 U. S. 466.

(r) *Error is dismissing cross-bill.*

Error in dismissing a cross-bill after all the evidence was in, was harmless where, on the evidence, defendant could not have recovered. *Muensch v. Bank*, 11 Mo. App. 144.

Sec. 10. Counts.

(a) *Objection to evidence improperly overruled, where it relates to a count of the complaint which was withdrawn.*

Objection to evidence improperly overruled is harmless error, where the evidence relates only to a count of the complaint withdrawn from the jury by the instructions of the court, and could not affect the cause of action upon which the verdict was rendered. *Hand v. Sodeletti*, 128 Cal. 674, 61 P. 373; *Mighell v. Dougherty*, 86 Iowa 480, 53 N. W. 402, 17 L. R. A. 755.

(b) One good count among several suffices.

A judgment will not be reversed for alleged failure of the evidence to sustain certain counts, where there is one good count to which the evidence applies. *R. Co. v. Redmond*, 171 Ill. 347; *R. Co. v. Hartman*, 71 Ill. App. 427; *Carter v. Thomas*, 3 Ind. 213; *Wood v. Cummins*, 3 Ind. 418; *Carl v. Smith*, 4 Ind. 79, 58 Am. Dec. 618; *McLean v. Ins. Co.*, 100 Ind. 127, 50 Am. Rep. 779; *R. Co. v. Warren*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; *Simmons v. Burnham*, 102 Mich. 189, 60 N. W. 476; *Bohannon v. Chapman*, 17 Ala. 696; *Newby v. Rowlands*, 11 Ore. 133, 1 P. 708; *Rawlinson v. Chr. Press Ass'n Pub. Co.*, 139 Cal. 620, 73 P. 468; *R. Co. v. McAllister* (Tex. Civ. App.), 90 S. W. 933; *Chamber Co. v. Clews*, 21 Wall. 317, 22 L. ed. 517; *Taylor v. Davies*, 38 Miss. 493; *contra*, *Abdil v. Abdil*, 33 Ind. 460. Full recovery under first count, sustaining demurrer to second immaterial. *Hentig v. Ks. Loan & Trust Co.*, 28 Kan. 617.

(c) Error in overruling demurrer to count, where affirmative charge for defendant given thereon.

Error in overruling a demurrer to a count in a complaint is harmless, where an affirmative charge was given for defendant thereon. *Woodward Iron Co. v. Andrews*, 114 Ala. 243, 21 S. 440.

(d) Refusal to give instruction as to certain counts to be disregarded, where evidence supports one good count.

An erroneous refusal to instruct the jury to disregard certain counts is harmless, where there is one good count to which the evidence is applicable, and it is sufficient to sustain the judgment. *R. Co. v. Anderson*, 166 Ill. 572.

(e) Sustaining demurrer to one count when there is no evidence to sustain it.

An error in sustaining a demurrer to one of the counts

of a declaration is immaterial where there is no evidence to sustain it. *Lucas Coal Co. v. Canal Co.*, 148 Pa. St. 227, 234, 990.

(f) *Overruling demurrer to defective counts, where no evidence was received or relief given thereon.*

The overruling of a demurrer to each count of the declaration, one or more of which are bad, is not ground for reversal, where no evidence was admitted or relief given on the defective counts, and defendant's rights were not prejudiced. *Pennington v. Gillespie*, 66 W. Va. 643, 66 S. E. 1009.

(g) *Stating one cause of action in two counts.*

In an action to recover for destruction to personalty and damage to railroad resulting from the same fire, the stating of the one cause of action in two counts is not prejudicial error to defendant, where the court decided that certain claims, stated as personalty, pertained to the railroad, and excluded them from the jury, and defendant, by plaintiff's blunder in the pleading, so escaped a part of the damages for which he was justly liable. *Sims v. R. Co.*, 83 Mo. App. 246.

(h) *Overruling demurrer to count cured by instruction.*

Error in overruling demurrer to a count of a declaration is cured by an instruction to the jury not to consider the count. *R. Co. v. Rosey's Adm'r*, 108 Va. 632, 62 S. E. 363.

(i) *In an action on two counts, insertion of item in wrong one.*

Where a suit is based on two causes of action, one a contract to manufacture certain articles, the other a running account, the insertion in the count on the latter of certain items which might have been included in the count on the contract is not ground for reversal, even if properly ob-

jected to, as it can not prejudice defendant. *Crescent Mfg. Co. v. N. O. Nelson Mfg. Co.*, 100 Mo. 325, 13 S. W. 503.

(j) *Allowing new count identical with one already in the complaint.*

Allowing to be added a new count, identical with one already in the complaint, is harmless. *Ala. Con. Coal & Iron Co. v. Heald* (Ala. Sup.), 53 S. 162.

(k) *Error in instruction confined to count not needed.*

A judgment will not be reversed for error in instructions based on a count upon which no reliance was placed at the trial, where there was a proper recovery on another count. *Monmouth Mining & Mfg. Co. v. Erling*, 45 Ill. App. 411.

(l) *Refusal of the court to instruct the jury to disregard certain counts in the declaration.*

The refusal of the court to instruct the jury to disregard certain counts in the declaration is not reversible error, when there is one more good count to sustain the judgment, to which the evidence is applicable. *Schulk v. Traction Co.*, 154 Ill. App. 108.

(m) *Not error to disregard counts to which evidence was inapplicable.*

If there be one good count on which the evidence is applicable, the error of the court, if any, in refusing to instruct the jury to disregard other counts is harmless. *Masonic Fraternity Temple Ass'n v. Collins*, 110 Ill. App. 504; *judgm't affm'd*, 210 Ill. 482, 71 N. E. 396.

(n) *Where entitled to recover on special count, erroneous instruction that he was entitled to recover on common counts.*

When a declaration contains a special count and also the common counts clearly entitled plaintiff to recover on the

special count, the appellate court will not reverse on account of the court below instructing the jury that he was entitled to recover on the common counts. *Herndon v. Givens*, 19 Ala. 313.

- (o) *Where jury's attention confined strictly to one count, refusal to charge that there can be no recovery on others.*

Where the jury's attention is strictly confined to questions depending wholly on facts alleged in a particular count, error in refusing to instruct that there can be no recovery except under that count is cured. *Insurance Co. v. Reynolds*, 36 Mich. 502.

Sec. 11. Defective pleadings.

- (a) *Irregular pleading is immaterial.*

An irregular pleading, where not affecting the result, does not warrant a reversal. *Webster v. Wheeler*, 119 Mich. 601, 5 D. L. N. 937, 78 N. W. 657.

- (b) *Overruling an untrue plea.*

A new trial will not be granted because defendant's plea of payment has been overruled in the trial, if such plea is not true. *Goode v. Love's Adm'r*, 4 Leigh (31 Va.) 635.

- (c) *Bad pleas, where no evidence was received under them.*

The allowance of bad pleas is harmless error, if no evidence is admitted under them. *Tower v. Whip*, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

- (d) *Answer denying the "material allegations" raises no issue.*

In a suit on a lost note, the answer denied the "material allegations" of the complaint, "in manner and form as therein set forth." Plaintiff offered in evidence a copy of the

note, which was rejected, on the ground that the loss had not been proved; the error was harmless, the execution and contents of the note being admitted by the pleadings. *Dole v. Burleigh*, 1 Dak. 227, 46 N. W. 692.

(e) *Wrong refusal to strike from the complaint unrecoverable allegations of damages, cured by proper recovery of damages.*

The erroneous refusal of the trial court to strike from a complaint an allegation of damages which were not recoverable in the action or even the consideration of such element of damages by the court on the subsequent trial without a jury, will not constitute ground for reversal of the judgment, where it appears that the damages awarded were not greater than the plaintiff was justly entitled to recover under the evidence on proper grounds alleged in the complaint. *Procter v. R. Co.*, 130 Cal. 20, 62 P. 306.

(f) *Failure to strike out parts of pleading.*

Though the court below may have erred in denying the motion to strike out part of a pleading as irrelevant, immaterial and redundant, still, if the facts alleged be proved in the case, without objection, or if they be inseparably connected with the evidence, error is without injury. *Wilson v. R. Co.*, 62 Cal. 164.

(g) *Objection to insufficiency of petition is too late when interposed for the first time in the reviewing court.*

In an action for damages for injuries resulting from a defective sidewalk, the objection that because of the indefinite allegation that the defect had existed "for a long time," the petition does not state a cause of action, comes too late when deferred until the case reaches the reviewing court. *Toledo v. Strasel*, 12 O. C. C. n. s. 212, 31 O. C. D. 432; *affm'd w. o.*, 82 O. S. 438, 87 O. S. 476; *Henkel v. Stahl*, 18 O. C. C. 831, 9 O. C. D. 542.

(h) *Holding pleading bad cured by proof of matter under another pleading.*

An error in holding bad a proper pleading is cured by the admission in proof, under other pleading, of the matter pleaded. *Insurance Co. v. Field*, 42 Ill. App. 392.

(i) *Defects in pleadings not affecting substantial rights.*

The court of appeals can not reverse a judgment by reason of defects in the pleadings which did not affect substantial rights. They must consider a variance as immaterial, in the absence of affirmative evidence that it misled the adverse party. *Johnson v. Hathorn*, 3 Keyes (N. Y.) 126, 2 Keyes 476, 2 Abb. Ct. App. Dec. 465.

(j) *Uncertainty in a pleading will not justify reversal.*

Uncertainty in a pleading will not justify reversal, where it appears that the party complaining suffered no substantial injury. *Keer v. O'Keefe*, 138 Cal. 415, 71 P. 447.

(k) *Pleading defective, as narrowing issue, insufficient to warrant reversal.*

Plaintiff brought an action to recover for damages from a fire started by a passing engine, and charged that such engine was negligently and carelessly managed. On the trial the issue of negligence was not restricted to negligent management, but defendant was permitted to introduce all its evidence with respect to the perfection and efficiency of its engine, as well as the care and skill with which it was operated. Held that, although the pleading was defective as narrowing the issue to negligence in operating the engine, yet, as defendant was allowed to introduce the same testimony that he would have introduced under a proper pleading, the supreme court will not reverse the judgment because of such defective pleading. *Wise v. R. Co.*, 85 Mo. 178.

- (l) *Inconsistency between complaint and reply will be disregarded.*

If the issues are fairly tried and no harm or surprise resulted to the defendant, inconsistency between complaint and reply will be disregarded. Dunbar, J., dissenting. Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 P. 327.

Sec. 12. Defenses.

- (a) *Improper defense, where there were other defenses upon which defendant must prevail.*

Where there are two defenses to same claim; if one sustains a verdict, immaterial whether the other is correct or not. Wolcott v. Smith, 81 Mass. (15 Gray) 537; Vennard v. McConnell, 93 Mass. (11 Allen) 555; Tucker v. Burkitt, 49 Ill. App. 278.

- (b) *Too narrowly limiting defense, where no defense beyond the boundary was offered.*

The fact that the court ruled erroneously that defendant was limited to certain grounds of defense, does not warrant a reversal if defendant did not offer to prove any defenses excluded by the ruling, and does not appear to have been deprived thereby of the benefit of any defenses. Abbott v. Lindenbower, 46 Mo. 291.

- (c) *One whose defense was erroneous is not entitled to a reversal on the ground of excessive damages.*

Where the foundation of a party's defense had been ruled erroneously in his behalf, he is not entitled to a reversal on the ground of excessive damages. Richardson v. Broughton, 3 Strobbart (S. C.) 1.

- (d) *Error in considering traverse and contributory negligence inconsistent defenses.*

In an action for negligence, a traverse and a plea of con-

tributory negligence are not inconsistent defenses, and the court erred in this case in rejecting an amended answer pleading contributory negligence. But as the defendant was allowed upon the trial, without objection, to go into the whole case just as if defendant's rejected pleading had been filed, and the court, without objection or exception, gave an instruction as to contributory negligence, the defendant was not prejudiced by the rejection of its amended answer. *East Tennessee Coal Co. v. Dobson*, 12 Ky. L. R. (abst.) 508.

(e) *Error in admitting testimony in rebuttal cured by defendant having no defense.*

The error in admitting testimony in rebuttal to defendant's case was not prejudicial, where defendant's evidence, even if true, constituted no defense. State to use of *Smythe v. Kane*, 42 Mo. App. 253.

(f) *Where defendant failed to prove his defense he can not complain of judgment for plaintiff.*

In an action on a note tried by the court, where the defendant totally fails to prove his defense, he can not complain that, on review, the appellate court directed judgment entered for plaintiff. *Rosenfield v. Goldsmith*, 11 Ky. L. R. 662, 12 S. W. 928.

(g) *Where the court should have found a certain defense bad, error in the evidence or charge upon that issue is immaterial.*

Where the court should have found a certain defense bad, as that the appraisal of the loss under the insurance policy was void, errors in the evidence or charge upon that issue are immaterial. *Insurance Co. v. Romeis*, 15 O. C. C. 697, 8 O. C. D. 633.

- (h) *Instruction ignoring defenses of lack of proofs of loss and breach of warranty as to valuation.*

Where proofs of loss were furnished in sufficient time and the question of their valuation was fairly submitted by the instruction, the fact that the instruction for plaintiff ignored the defenses of lack of proofs of loss and the breach of warranty as to the valuation, was not reversible error. *Shell v. Insurance Co.*, 60 Mo. App. 644.

- (i) *Submission, under instruction, of several grounds of negligence, or matter of defense, in the conjunctive.*

The submission of several grounds of negligence or matters of defense in the conjunctive is not reversible error in the absence of a request to submit them disjunctively, if the jury is not misled thereby. *Guinn v. R. Co.* (Tex. Civ. App.), 142 S. W. 63.

Sec. 13. Demurrers overruled.

- (a) *Overruling a demurrer before passing on a motion.*

Where a demurrer and motion for a change of venue were both properly overruled, it was not error to first overrule the demurrer. *Pennie v. Visher*, 94 Cal. 323, 29 P. 711.

- (b) *Where correct result was reached, form of demurrer interposed was immaterial.*

Where a correct result was reached in ruling on the sufficiency of the pleading, the form of the demurrer interposed was immaterial. *Insurance Co. v. Norcross*, 163 Ind. 319, 72 N. E. 132.

- (c) *Striking out, instead of overruling, a demurrer.*

That the demurrer was stricken out, instead of being overruled, is a harmless irregularity. *Hensley v. Lytle*, 5 Tex. 497. 55 Am. Dec. 741.

(d) *Demurrer struck out as irregular and defective.*

Plaintiff in error demurred to the replication, the substantial ground of demurrer being that the "replication" was a departure in pleading. The court struck out the demurrer as irregular and defective. Thereupon plaintiff in error filed a rejoinder to the replication, and the cause went to trial. Held, that it was unnecessary to determine whether the order striking out the demurrer was erroneous or not, because where the questions in controversy between the parties were actually put in issue, tried and determined, and the order, if erroneous, did no injury. *Monmouth Park Ass'n v. Warren*, 55 N. J. L. 598, 27 A. 932.

(e) *Error in overruling demurrer to complaint, answer or reply, or paragraphs thereof, where pleadings afterwards withdrawn.*

Error in overruling a demurrer to the complaint, answer or reply, or paragraphs thereof, was harmless, where the complaint, answer or reply, or paragraphs thereof, was afterwards withdrawn. *White v. Garretson*, 34 Ind. 514; *M. & S. Furniture Co. v. Taschner*, 40 Ind. App. 673, 81 N. E. 736.

(f) *Overruling demurrer for misjoinder of parties is not prejudicial error where cause of action is shown against demurrant.*

The overruling of a demurrer for misjoinder of parties is not prejudicial error, where the petition shows a cause of action against the demurrant. *Telephone Co. v. Jackson*, 4 O. C. C. n. s. 386, 16 O. C. D. 89.

(g) *Overruling demurrer for misjoinder of defendants.*

In an action to foreclose a mortgage, where persons made defendants, because of their claim to some interest in the land subsequently to the mortgage lien, demur because

of their misjoinder, the overruling of such demurrer, though erroneous, will not warrant a reversal, if the court find that they had acquired no rights in the mortgaged property. *Watt v. Wright*, 66 Cal. 202, 5 P. 91.

(h) *Overruling demurrer for misjoinder, no substantial right of defendant being invaded.*

Where, in an action to compel the conveyance of plaintiff's respective water rights, and to enjoin further interference therewith, no substantial right of a defendant has been invaded by a misjoinder of parties plaintiff, a judgment after a trial on the merits will not be reversed because of error in overruling a demurrer for such misjoinder. *Daly v. Ruddell*, 137 Cal. 671, 70 P. 784.

(i) *Overruling demurrer to separate defense for defect of parties plaintiff, where the defense was abandoned.*

Where a demurrer to a separate defense in an answer setting up a defect of parties plaintiff is erroneously overruled, the error is without prejudice to plaintiffs as defendants subsequently abandoned the defense. *Burroughs v. De Cours*, 70 Cal. 361, 11 P. 734.

(j) *Error in overruling demurrer for misjoinder, where it did not affect the substantial rights of the parties.*

Error in overruling a demurrer for misjoinder is immaterial, if it does not affect the substantial rights of the parties. *Angell v. Hopkins*, 79 Cal. 182, 21 P. 729.

(k) *Overruling demurrer for misjoinder of causes of action, where judgment is given on the merits.*

Where the substantial rights of the parties to an action have not been affected by the misjoinder of causes of action, a judgment rendered after a trial of the case upon its merits should not be reversed because the court overruled

a demurrer for such misjoinder. *Asevado v. Orr*, 100 Cal. 293, 34 P. 777.

- (l) *Error in overruling demurrer for misjoinder cured by dismissal of husband from the case.*

In an action by a married woman against a city for personal injuries, where her husband was joined with her as plaintiff, and sought to recover for the loss of her services, the error in overruling a demurrer for misjoinder was cured by the subsequent dismissal of the husband from the case. *City of Eskridge v. Lewis*, 51 Kan. 376, 32 P. 1104.

- (m) *Overruling demurrer to complaint for ambiguity, where defendant not misled by it.*

Abstract error in overruling a demurrer to the complaint is not cause for reversal where the answer shows that defendant was not misled to his prejudice by such ambiguity, and the case was tried on issues defined by the answer. *Alexander v. Central Lumber Co.* 104 Cal. 502, 38 P. 410.

- (n) *Not reversible error to overrule a demurrer to a part of the complaint.*

It is not reversible error to overrule a demurrer to a bad paragraph of a complaint where the instructions were predicated upon the other paragraphs, and the jury answered 35 interrogatories covering about every fact in issue, and adopted the theory of liability thereon exclusive of the defective paragraph. *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200.

- (o) *Where defendant was not injured by overruling demurrers to complaint, he has no available error to present.*

Where there was no evidence tending to prove the first or

second set of words alleged in the first paragraph of the complaint in an action for slander, defendant was not injured by the ruling of the court in overruling demurrers thereto, and therefore no available error is presented for the consideration of the supreme court. *Casey v. Hulgan*, 118 Ind. 590, 21 N. E. 322.

(p) *Overruling demurrer to complaint to restrain interference with telephone, where no prejudice resulted therefrom.*

In an action to restrain defendants from interfering with plaintiff telephone company's maintenance of a stubpole and anchor in the street in front of defendants' premises and for damages, where plaintiff alleged the necessity for the pole and anchor, and defendants' refusal to allow its erection, to which complaint defendants demurred for want of facts; overruling the demurrer, after part of the evidence was heard, and allowing defendants to file a second paragraph to the answer alleging that the pole and anchor were erected in front of their premises, were without authority, against their will, and to their damage, for which they had received no compensation, was not prejudicial to plaintiff, since there was no proof of damages, and no judgment therefor rendered against it. *New Long Distance Tel. Co. v. White (Ind.)*, 90 N. E. 1038.

(q) *Overruling demurrer to complaint where special findings showed clear right to recover.*

Where special findings of fact show a clear right of recovery and the conclusions of law thereon are correct, the overruling of demurrers to the complaint was not prejudicial. *Shank v. Trustees of McCordsville Lodge (Ind.)*, 88 N. E. 85.

- (r) *Overruling demurrer to complaint, it being shown that agent of defendant was not a fellow-servant.*

In an action against the owner of a building and an elevator company for injuries sustained by plaintiff in doing the work, uncertainty in the complaint as to the relation between the defendant because of want of knowledge of the contract between them, and an allegation that the elevator company's agent represented both defendants, is not cause for reversal, because of the overruling of a demurrer to the complaint, it being shown that such agent was not a fellow-servant. *Parkhurst v. Swift*, 31 Ind. App. 521, 68 N. E. 620.

- (s) *Overruling of demurrer to complaint which failed to allege knowledge by defendant of defective fastening.*

Where, in an action for the wrongful death of a servant, owing to the fall of a derrick occasioned by the breaking of one of its guy ropes, the jury specially found that the master mechanic of defendant, prior to the accident, had been notified that the fastening was unsafe, and that the accident happened because of such unsafe fastening, and the answers to the interrogatories showed that defendant had notice of the defect, the overruling of the demurrers to the complaint, on the ground of the absence of an averment of knowledge of defective fastenings, was not prejudicial to defendant. *Consolidated Stone Co. v. Morgan*, 160 Ind. 241, 66 N. E. 696.

- (t) *Overruling demurrer, where material fact omitted, cured by subsequent pleading having it.*

Erroneously overruling a demurrer for want of a material fact is cured if the fact is alleged in a subsequent pleading, and the case is tried thereon. *Insurance Co. v. McGookey*, 33 O. S. 555; *Insurance Co. v. Hare*, 5 O. C. C. n. s. 348, 16 O. C. D. 197; rev. w. o., 74 O. S. 466.

- (u) *Improperly overruling demurrer to petition for want of necessary averment will not reverse if covered by a full hearing at the trial.*

If a demurrer to the petition because of the omission of an averment is improperly overruled, but a full hearing on the omitted charge is had at the trial, there is no ground to reverse. *Volksblatt Co. v. Hoffmeister*, 62 O. S. 189.

- (v) *Overruling demurrer on the ground of uncertainty as to alleged extra work, where nothing allowed, in decree therefor.*

The overruling of a demurrer on the ground of uncertainty of allegation as to the character and extent of extra work alleged, is harmless and not ground for reversal, where nothing is allowed or awarded in the decree on account of extra work. *Wood v. O. & B. Rapid Transit Co.*, 107 Cal. 500, 40 P. 806.

- (x) *Overruling demurrer to complaint for uncertainty, where defendant answered and no prejudice is shown.*

The plaintiff sued for the possession of a mining claim, alleging that defendants unlawfully took possession of and ousted plaintiff therefrom, and that defendants were engaged in extracting ore, and that the value of the ore wrongfully taken was \$1,000. Defendants demurred to the complaint for uncertainty, objecting that the ouster was alleged to be from only a portion of the mine, and did not describe the portion, that the damages were alleged on information and belief, and that there was no allegation that any cuts had been made by defendants. The demurrer was overruled, and the defendants answered alleging ownership and right of possession in the whole claim. Held, that the overruling of the demurrer was not reversible error, since the defendants could not have been misled by the uncertainty in the complaint. *Contrera v. Merck*, 131 Cal. 211, 63 P. 336.

- (y) *Error in overruling a demurrer to a complaint for uniting an action on a guaranty in a suit to foreclose a mortgage, where court found guaranty without consideration.*

Error, if any, in overruling a demurrer to the complaint, on the ground that it united with a cause of action for foreclosure of a mortgage a cause of action on a guaranty is harmless, the court having found that the guaranty was without consideration. *Bank v. Fisher* (Cal.), 41 P. 490.

- (z) *Overruling demurrer to second paragraph of complaint cured by verdict based on the first paragraph.*

In an action against an estate to recover the value of the services rendered deceased as housekeeper and nurse, the complaint stated in the first paragraph a general account for the services, and in the second paragraph alleged a special promise by deceased to give plaintiff one-third of his estate for her services. The jury found specially that there was no evidence of the special contract, and generally in favor of the plaintiff for the value of her services. Held, that the error of the court in overruling a demurrer to the second paragraph was harmless, since the general verdict was evidently based on the first paragraph. *Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456; *Clark v. Yocum*, 116 Cal. 515, 48 P. 498; *Maconder v. Bigelow*, 126 Cal. 9, 58 P. 312; *Rawlinson v. Christian Press Ass'n Pub. Co.*, 139 Cal. 620, 73 P. 468; *Marvin v. Bayer*, 145 Ind. 261, 44 N. E. 310; *Blasingame v. Blasingame*, 24 Ind. 86; *Bedford Quarries Co. v. Turner*, 38 Ind. App. 552, 77 N. E. 58; *Snyder v. Schardt*, 9 O. C. C. n. s. 615, 19 O. C. D. 714.

- (a-1) *Not reversible error to overrule demurrer to complaint of intervening heirs, where result not affected thereby.*

In an action against an administrator, it is not reversible error to overrule a demurrer by plaintiff to the complaint of

intervening heirs, when the issues presented are the same as those raised by the answer of the administrator, and judgment must be the same as though the demurrer had been sustained. *Watson v. Miller*, 125 Cal. xix, 58 P. 135.

(b-1) *Substantial rights unaffected by overruling demurrer to the complaint.*

In a suit by the surviving joint owner of a note, as the sole devisee of his deceased co-owner, a demurrer to the complaint was overruled, and after trial judgment rendered for plaintiff, the only defense being that of payment. It did not appear whether any one had ever qualified as administrator of the deceased payee, nor whether he left any debts, and five years has elapsed since his death. Held that, though the plaintiff might not have been entitled to an action in her own right, the judgment would not be reversed, since the error, if any, in overruling defendant's demurrer, did not affect the substantial rights of the parties. *Perry v. Perry*, 98 Ky. 242, 17 Ky. L. R. 868, 32 S. W. 755.

(c-1) *There is no error in overruling a demurrer to a bad answer where the complaint is bad.*

If the answer be bad there is no error in overruling a demurrer to it, where the complaint is bad. *State v. Myers*, 100, Ind. 487; *Ferson v. Drew*, 19 Wis. 225.

(d-1) *Erroneous overruling of demurrer cured by verdict.*

Where a counterclaim for damages for breach of a covenant by a landlord to build a laundry on the premises was set up in an action for rent, and that issue tried, the overruling of a demurrer to the complaint, on the ground that it neither alleged performance, nor excused nonperformance of the covenant, was error without prejudice, where it appears that the tenants agreed to use other portions of the building as a laundry, and that the verdict for plaintiff for rent was diminished by more than the amount of

damages shown to have been sustained by the breach. *Gillespie v. Hagens*, 90 Cal. 90, 27 P. 34.

(c-1) *Where answer supplied want of clearness in the complaint, overruling demurrer thereto was harmless.*

Where no special demurrer was filed to the complaint, any uncertainty arising from the generality of its allegations was supplied by the full and specific statement of the answer, and the cause of action was stated in a general meager way, the judgment can not be reversed because of the overruling of a general demurrer. *Hunt v. Davis*, 135 Cal. 31, 66 P. 957.

(f-1) *Error in overruling demurrer to a bill omitting necessary parties.*

Error in overruling demurrer to a bill omitting parties necessary and proper, according to the allegations thereof, but who appear by the proof to have had no interest in the suit, is not reversible, since the irregularity is merely formal, and may be ignored in the interest of substantial justice. *White v. White*, 64 W. Va. 30, 60 S. E. 885.

(g-1) *Improperly overruling demurrer to complaint for ambiguity which could have been remedied by amendment.*

Where an ambiguity in a complaint could easily have been remedied by amendment, the judgment should not be reversed because a special demurrer on that ground was improperly overruled. *Olsen v. Birch*, 133 Cal. 479, 85 Am. St. Rep. 215, 65 P. 1032.

(h-1) *Overruling demurrer to answer immaterial when plaintiff not entitled to recover.*

In an action to redeem lands sold under a mortgage one paragraph of the complaint claimed rents and profits. De-

defendant answered thereto that it had made large expenditures for permanent improvements. A demurrer to this answer was overruled. Held, that the plaintiff was not harmed thereby, it appearing that the court found specially the facts upon which she claimed a right to redeem, and concluded therefrom that she had no such right. *Miller v. Hardy*, 131 Ind. 13, 29 N. E. 776.

(i-1) *Overruling demurrer to argumentative answer immaterial.*

In an action for work done on defendant's property, defendant pleaded that at the time the work was done she was a married woman, that the work was done on the order of her husband, that she in no way contracted for the work, that it was the separate contract and debt of her husband, and that she had in no way made it her separate indebtedness. Held, that although such defense might be argumentative, and its material averments be proved under the general denial, the overruling of a demurrer thereto would not work a reversal of a judgment for defendant. *Ogden v. Kelsey*, 4 Ind. App. 290, 30 N. E. 922; *Goods v. Elwood Lodge*, 160 Ind. 251, 66 N. E. 722.

(j-1) *Overruling demurrer to answer, where relief is given on the cross-complaint.*

In partition, the answer did not state any defense to the claim of one of the plaintiffs, and plaintiffs' demurrer; but defendants, in their cross-complaint, asked that the claim of such plaintiff be determined and title quieted. Partition was awarded to such plaintiff as demanded in the cross-complaint. Held, that overruling the plaintiffs' demurrer was harmless error. *Priest v. Lackey*, 140 Ind. 399, 39 N. E. 54.

(k-1) *Harmless error to overrule demurrer to defenses upon which the judgment does not depend.*

The action of the court in overruling a demurrer to a

special defense will not be reviewed separately, where it does not appear that the judgment in any respect depends on such defenses or that any evidence at the trial in support of it was admitted. *Pence v. McPherson*, 30 Ind. 66; *McFadden v. Schroeder*, 9 Ind. App. 49, 35 N. E. 131.

(l-1) *Overruling demurrer to bad paragraph of answer, when judgment awarded to defendant for want of reply to good paragraph.*

A judgment will not be reversed for error in overruling a demurrer to a bad paragraph of an answer, when judgment was rendered for defendant on the refusal of plaintiff to reply to a good paragraph. *New Eel River Draining Ass'n v. Durbin*, 30 Ind. 173; *Hamilton v. City of New Albany*, 30 Ind. 482; *Welsh v. Brown*, 8 Ind. App. 421, 35 N. E. 921.

(m-1) *Overruling demurrer to plea or answer, where facts provable under general denial or another special plea.*

It is not reversible error to overrule a demurrer to a plea or answer, if the facts set up in it are insufficient to defeat the plaintiff's cause of action, where all of such facts were provable under the general denial or another special plea or answer. *Booker v. Goldsborough*, 44 Ind. 490; *Binford v. Thomas*, 18 Ind. App. 330, 47 N. E. 1075.

(n-1) *Overruling demurrer to answer in confession and avoidance, when matters alleged were admissible under other pleas.*

In an action to enjoin the collection of a ditch assessment, wherein the answer consisted of a general denial and a second paragraph in confession and avoidance, error in overruling a demurrer to the second paragraph for want of sufficient facts was harmless, where the matters therein alleged

were admissible under the pleadings without such paragraph. *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12.

(o-1) *Overruling demurrer to second paragraph of answer, when judgment given for a smaller amount than asked.*

Where, in an action on a note for \$3,000, the second paragraph of the answer was, "no consideration," and the third paragraph was "failure of consideration," judgment for \$500 must of necessity have been on the third paragraph, and plaintiff was not prejudiced by the error in overruling a demurrer to the second paragraph, on the ground that it failed to allege notice by plaintiff of the note's invalidity. *Shirk v. Neible*, 156 Ind. 56, 59 N. E. 281; 83 Am. St. Rep. 150. (This is an exceedingly interesting case on the subject of bona fides of alleged innocent purchaser of negotiable paper, before maturity, for a valuable consideration, and also the relation of attorney and client.)

(p-1) *Where plaintiff appeals he can not complain of the overruling of demurrer to plea which, if valid, was a bar to the action.*

Where judgment has been rendered for plaintiff, who appeals because the judgment is so small that defendant is given costs, he can not complain that the court erred in overruling a demurrer to a plea which, if valid at all, was a bar to the whole action. *State, ex rel. Crandall, v. Mann*, 3 Ind. 350.

(q-1) *Overruling demurrer to paragraph of an answer where plaintiff was not entitled to recover.*

Overruling a demurrer to a paragraph of the answer is not reversible error where, under the facts established under another paragraph, plaintiff was not entitled to recover. *Pollard v. Pittman*, 37 Ind. App. 475, 77 N. E. 293.

(r-1) *Overruling demurrer where same benefit derived as though it had been sustained.*

The overruling of a demurrer is not ground of error, however improper, where the case was tried upon a ground which gave the party the benefit of the question evidently intended to be made, and which would have been made if the demurrer had been sustained. *Rose v. Ruyle*, 46 Ill. App. 17.

(s-1) *Overruling demurrer to plea, where effect was to require proof of facts of which proof was made.*

Error in overruling a demurrer to a plea is without injury, where its effect was only to require proof of certain facts of which proof was made. *Scarborough v. Borders*, 115 Ala. 436, 22 S. 180.

(t-1) *Erroneous overruling of a demurrer to new matter in an answer under which defendant introduced no proof.*

The erroneous overruling of a demurrer to new matter in an answer, under which defendant has introduced no proof is without prejudice, and no ground for a reversal. *Campbell v. Bear River, etc., Min. Co.*, 35 Cal. 679.

(u-1) *Overruling special demurrer to defense will not be reviewed where no evidence was admitted to support it.*

The action of the court in overruling a demurrer to a special defense will not be reviewed on appeal, where it does not appear that the judgment in any respect depends upon such defense, or that any evidence at the trial in support of it was admitted. *Britton v. Bank*, 112 Cal. 1, 44 P. 339.

(v-1) *In action against indorser on a note, overruling of demurrer to answer setting up mistake and want of consideration.*

Where, in an action against an indorser of a note who

answered that the indorsement was made by mistake and without consideration, and also filed a cross-complaint to the same effect for cancellation of the indorsement, and the court, sitting as a jury, found in defendant's favor on the issue raised by the petition and answer, an order overruling plaintiff's demurrer to the cross-complaint was not prejudicial to plaintiff. *Harrison v. Davis*, 131 Cal. 635, 63 P. 1005.

(w-1) *Error in overruling demurrer to insufficient defense not available, where other defense constitutes bar to action.*

Where two defenses are pleaded to a cause of action, one of which is good and the other bad, and a demurrer is overruled to both defenses, and the plaintiff elects to stand on the demurrer, the error in overruling the demurrer to the insufficient defense is not available, the other defense constituting a plea in bar to the action. *Fire Extinguisher Co. v. City of Perry*, 8 Okla. 429, 58 P. 635.

(x-1) *Error in disallowing demurrer on a defective plea.*

Where it appears from the record, upon appeal in error, that the merits of the case have been reached upon the issues joined, and that the court below committed an error in disallowing a demurrer to a defective plea, which was of itself useless in the case, the supreme court will not reverse on that account. *Brown v. Reynolds*, 37 Tenn. (5 Sneed) 639.

(y-1) *Error in overruling demurrer where all parties interested in the fund were fully heard.*

When all the parties interested in a fund were before the court and were fully heard, and no evidence was introduced that could not have been introduced if a demurrer to a cross-complaint had been sustained, error, if any, in overruling the demurrer was harmless. *Bowen v. Eaton* (Ind.), 89 N. E. 961.

(g-1) *Overruling demurrer on cross-complaint when same question arose on exceptions.*

The overruling of a demurrer to a cross-complaint is not reversible error, when the same question again arises on exceptions to the conclusions of law on the facts specially found. *Scanlan v. Stewart*, 138 Ind. 574, 37 N. E. 401, 38 N. E. 401.

(a-2) *Where no relief is given under paragraph of cross-complaint, overruling demurrer harmless.*

Where no affirmative relief is granted under a paragraph of a cross-complaint, the error in overruling a demurrer to that paragraph is harmless. *Royce v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485.

(b-2) *Error in overruling demurrer to cross-complaint did not mislead the plaintiff.*

Where a cause was fully tried on the merits, and any ambiguity in a cross-complaint was cleared up by the evidence, and the plaintiff was not misled, overruling a demurrer to the cross-complaint is not ground for reversal. *Peterson Bros. v. Mineral King Fruit Co.*, 140 Cal. 624, 74 P. 162.

(c-2) *Overruling a demurrer for multifariousness cured by amendment.*

Overruling a demurrer to a complaint on the ground of multifariousness, is not assignable as error, where plaintiff, before the hearing on the merits, so amends his complaint that it ceases to be multifarious. *Vail v. Hammond*, 60 Conn. 374, 22 A. 954, 25 Am. St. Rep. 330.

(d-2) *Correctness of overruling a demurrer to a counterclaim will not be determined.*

In an action to redeem land sold under a mortgage one paragraph of the complaint claimed such a price. The an-

swer contained a counterclaim. A demurrer to this answer was overruled. Held, that plaintiff was not harmed by the ruling, it appearing that the court found specially the facts on which he claimed a right to redeem, and concluded therefrom that he had no such right, and its correctness will not be determined. *Ball v. Ball*, 132 Ind. 156, 31 N. E. 460.

(c-2) *Overruling demurrer not affecting substantial rights.*

Where the merits of the case have been fairly tried and determined by the trial court, the judgment can not be reversed for an error in overruling a demurrer which did not affect the substantial rights of the parties. *Crake v. Crake*, 18 Ind. 156; *Cooper v. Jackson*, 99 Ind. 566; *Hildebrand v. McCrum*, 101 Ind. 61.

(f-2) *Overruling demurrer for uncertainty and ambiguity disregarded.*

A judgment, after trial on the merits, will not be disturbed on appeal because of the overruling of a demurrer to the answer on the ground of uncertainty and ambiguity, it not clearly appearing that there was prejudice therefrom. *Stephenson v. Deuel*, 125 Cal. 656, 9 Am. St. Rep. 151, n., 58 P. 258.

(g-2) *Overruling demurrer, where court removes objectionable feature by its charge.*

Overruling of a demurrer, though erroneous, is harmless where the court removes the objectionable features by its charge. *R. Co. v. Butler Marble & Granite Co.* (Ga. App.), 68 S. E. 775.

(h-2) *Overruling demurrer to cross-complaint where answer justified the finding reached.*

Where the court and counsel tried the case on the complaint and answer, without regard to a cross-complaint, and the allegations of the answer suffice to justify the findings,

the cross-complaint will be rejected as surplusage, and error in overruling demurrer thereto will be disregarded. *Vance v. Smith*, 124 Cal. 219, 56 P. 1031.

(i-2) *Erroneously overruling demurrer to plea, cured by reply and judgment for plaintiff.*

Though plaintiff's demurrer to defendant's plea is erroneously overruled, if plaintiffs plead over and obtain judgment for a part of their claim, and no evidence appears in the record to show that the judgment was not for the entire amount due plaintiffs, as there is no apparent injury to plaintiffs they can not obtain a reversal. *State v. Nanks* (Md. Sup.), 24 A. 540.

(j-2) *Overruling demurrer to replication where burden of proving consideration fell upon plaintiff.*

The overruling of a demurrer to the replication to a plea of no consideration is not ground of error, where there is a plea of the general issue, and under that plea the burden of proving consideration is upon the plaintiff. *Green Co. v. Blodgett*, 49 Ill. App. 180.

(k-2) *Error in overruling demurrer to replication to a plea in abatement, where plea is bad, as demurrer should have been sustained thereto.*

The error in overruling a demurrer to a replication to a plea in abatement is harmless, if the plea in abatement is bad, since in that case the demurrer should have been carried back and sustained to the plea. *Insurance Co. v. Hedrick*, 73 Ill. App. 601, affm'd, 178 Ill. 212, 52 N. E. 1034.

(l-2) *In action involving identity of causes, to overrule a demurrer to second replication to plea of statute of limitations.*

To an amended declaration was filed a plea of limitations,

that the cause of action did not "accrue within two years next before the commencement of this suit; to wit, the filing of said declaration as amended." The first replication there-to averred that the cause of action "did accrue to him within two years next before the commencement of this suit." The second replication alleged that the cause of action in the amended declaration was the same as that in the original declaration. Held, that any error in overruling a demurrer to the second replication was harmless, as under the plea and the first replication, the words of the plea, "to wit, the filing of said declaration as amended," being a mere conclusion, the issue was whether the cause of action accrued within two years of the commencement of the suit, which involved a question for the jury, when the injury sued for occurred; another question for the court, whether the suit was commenced when the original declaration was filed; that is, whether the causes of action alleged therein were identical. 102 Ill. App. 318, affm'd, R. Co. v. McMeen, 206 Ill. 108, 68 N. E. 1093.

Sec. 14. Demurrers sustained.

- (a) *Demurrer for want of capacity to sue sustained, when should have been for not stating a cause of action.*

The rule that a judgment will not be reversed for a harmless error applied, where a demurrer to a complaint put upon the ground of want of capacity to sue had been sustained, whereas the demurrer should have been put upon the ground that the complaint did not state a cause of action. *Debolt v. Carter*, 31 Ind. 355.

- (b) *When a demurrer to a plea is sustained, and defendant pleads over, he can not assign the sustaining of the demurrer as error.*

When demurrer to a plea is sustained, with leave to defendant to plead over, and the defendant pleads over, he

can not assign the sustaining of the demurrer as error. *Judge v. Moore*, 9 Fla. 269.

(c) *Erroneously sustaining demurrer to a plea in abatement.*

It was harmless error to sustain a demurrer to a plea in abatement for the misnomer of defendant, where plaintiff afterwards amended her complaint by inserting the true name. *R. Co. v. Buford*, 106 Ala. 303, 17 S. 395; *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140; *Town of Knox v. Golding* (Ind. App.), 91 N. E. 857.

(d) *Where right result is reached, that a demurrer was employed instead of a motion is immaterial.*

Possible error in sustaining a demurrer, for the reason that a motion was the proper remedy, is harmless where the correct result is reached. *Tousey v. Bell*, 23 Ind. 423; *Harris v. Randolph County Bank*, 157 Ind. 120, 60 N. E. 1025; *Lane v. State, ex rel. Harmon's Adm'r*, 27 Ind. 108; *Dawson v. Vaughn*, 42 Ind. 395; *Lewis v. Town of Brandenburg*, 105 Ky. 14, 20 Ky. L. R. 1011, 48 S. W. 978.

(e) *Sustaining informal demurrer to insufficient answer.*

The sustaining of an informal demurrer to an insufficient answer is not cause for reversal. *McDaniel v. Osborn* (Ind. App.), 72 N. E. 601; *Bd. Comm'rs of Morgan Co. v. Crone*, 36 Ind. App. 283, 75 N. E. 826; *Same v. Neely*, 36 Ind. App. 706, 75 N. E. 829.

(f) *Where action was proper, employing a demurrer instead of a motion to strike out was harmless.*

Where a demurrer is interposed to pleas, when a motion to strike out would have been the proper method of attack, but no such point is made either below or in the appellate court, and the pleas in question are so faulty that the court would have been justified in striking them out of its own

motion, the sustaining of the demurrer will be considered harmless error. *Hooker v. Forrester*, 53 Fla. 392; *R. Co. v. Crosby*, 53 Fla. 400; *McKennon v. Johnson, Adm'r*, 57 Fla. 120; *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5.

(g) *Sustaining demurrer to complaint the averments of which could authorize the recovery only of nominal damages.*

Where the averments of the pleading are such as to authorize the recovery of nominal damages only, and do not involve the establishment or vindication of any substantial right, the sustaining of a demurrer to such pleading is not available error. *Reid v. Johnson*, 132 Ind. 416, 31 N. E. 1107; *Axtel v. Chase*, 77 Ind. 74; *Williams v. Henley*, 16 Ind. App. 464, 45 N. E. 622; *Cahuzac v. Saineni*, 29 Ala. 288; *Hesse v. Imperial Elec. Co.*, 144 Mo. App. 549, 129 S. W. 49.

(h) *Sustaining demurrer to sufficient complaint where there was no evidence to sustain it.*

A ruling sustaining a demurrer to a sufficient cause of action is harmless, where there was no evidence to sustain it. *Harmon v. Western Union Tel. Co.*, 65 S. C. 490, 43 S. E. 959; *Hart v. Carlett*, 4 Dec. Repr. (Ohio) 181, 1 Cleveland (Ohio) L. Rep. 93.

(i) *Demurrer to complaint sustained and judgment, on appeal, upheld if any one of the grounds be well taken.*

Where defendant interposes several grounds of demurrer to the complaint, and the court sustains them all, but plaintiff declined to amend and final judgment is rendered against him, the appellate court will sustain the action of the primary court, if any one of the grounds is well taken. *Guilford v. Kendell*, 42 Ala. 651.

- (j) *Erroneously sustaining demurrer to plea of set-off, but door left open to receive evidence thereunder.*

In an action for breach of a contract of sale, where a demurrer to a special plea of set-off is erroneously sustained, the error is harmless, when plaintiff, in support of his account and under the general issue, introduces such evidence as to matters covered by the special plea as would open the door for all the evidence which defendant could have offered thereunder if it had been held good. *Hudmon v. Cuyas* (Ala.), 57 Fed. 355, 6 C. C. A. 381.

- (k) *Erroneously sustaining a demurrer to an answer or reply, where party had benefit of averments on the trial.*

Erroneously sustaining a demurrer to an answer or reply is not reversible error, if the defendant had the benefit of his averments on the trial. *Lewis v. Coulter*, 10 O. S. 451; *Davis v. Gray*, 17 O. S. 330; *Sage v. Slontz*, 23 O. S. 1; *Kitchen v. Loudenback*, 48 O. S. 177; *Pedrick v. Post*, 85 Ind. 255; *Mason v. Mason*, 102 Ind. 38, 26 N. E. 124; *R. Co. v. Peck*, 55 Fla. 402; *Shreffler v. Nadelhaffer*, 133 Ill. 536; *Ins. Co. v. Baker*, 49 Ill. App. 92; *Slayton v. Ins. Co.*, 3 Ind. App. 312; 29 N. E. 608; *Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132; *McGee v. State, ex rel. Axtell*, 103 Ind. 444, 3 N. E. 139; *R. Co. v. Emmons*, 42 Ill. App. 138; *Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248; *Park v. Holmes*, 22 Ill. 522; *Newberger v. Finney*, 17 O. C. C. 215, 9 O. C. D. 720; *R. Co. v. Hissong*, 97 Ala. 189, 13 S. 209; *Milligan v. Pollard*, 112 Ala. 465, 20 S. 620; *Pollock v. Brush Electric Ass'n*, 128 U. S. 446, 32 L. ed. 474; *Complant v. R. Co.*, 61 Conn. 531, 23 A. 870, 15 L. R. A. 334; *Sammes v. Wightman*, 31 Fla. 100, 12 S. 526; *R. Co. v. Hibernian Soc.*, 83 Md. 420, 34 A. 1017; *R. Co. v. Brooks*, 69 Miss. 168, 13 S. 847.

- (l) *As same evidence may be given without an answer, sustaining demurrer to special answer is harmless.*

Since all defenses may be given in evidence without an answer or plea under Act of May 13, 1852, and Act of March 4, 1853, the sustaining of a demurrer to a special answer is harmless. *Poffenberger v. Blackstone*, 57 Ind. 288; *Zerger v. City of Greensburgh*, 60 Ind. 1; *Jones v. Parks*, 78 Ind. 537; *Jones v. McElwee*, Id. 602.

- (m) *Sustaining demurrer to answer alleging matter in mitigation of damages only.*

A decision sustaining a demurrer to an answer which alleges matter in mitigation of damages only can not harm the defendant, as he can give the same matter in evidence on the assessment of damages without an answer. *Allis v. Vanson*, 41 Ind. 154. (See preceding case.)

- (n) *Error in sustaining demurrer to part of plea when excluded part included in an amended plea.*

A demurrer goes to the whole of a plea, and it is error to sustain a demurrer to a portion of a plea; but where a demurrer to a portion of a plea is erroneously sustained, and the portion so overruled is afterwards made a part of and the basis of an amended plea, no harm results from such error. *Muller v. Ocala F. & M. Works*, 49 Fla. 189; *Whitman v. Winchester Repeating Arms Co.*, 55 Conn. 247, 10 A. 571; *Woodward Co. v. Andrews*, 114 Ala. 243, 21 S. 440.

- (o) *Where a case is tried on the merits the erroneous sustaining of a demurrer is harmless.*

If certain facts alleged and adjudged insufficient on demurrer are admissible under the pleadings on which the case is tried, and for aught that appears were actually ad-

mitted in evidence, the action of the court in sustaining the demurrer, even if erroneous, must be regarded as harmless. *Boyle v. McWilliams*, 69 Conn. 201.

- (p) *Demurrer to six replications sustained as to five, the one remaining represented what was in the other five, and sustaining demurrer can not be assigned as error.*

The plaintiff filed six replications to the defendant's plea. The defendant demurred to them all. The court sustained the demurrer as to five of them, and overruled as to one. Held, that inasmuch as the five replications, as to which the demurrer was sustained, contained nothing more as an answer to the plea than was contained in the one to which the demurrer was overruled, the judgment sustaining the demurrers can not be assigned as error. *Joseph v. Salomon*, 19 Fla. 623.

- (q) *Sustaining demurrer to plea cured by plaintiff filing a replication.*

An objection to a decision sustaining a demurrer to a plea is cured where the plaintiff afterwards files a replication, so that the defendant has the benefit of the plea. *Crist v. Wray*, 76 Ill. 204.

- (r) *Erroneously sustaining demurrer to plea of breach of warranty by insured of the use of intoxicants.*

A ruling in a suit on a policy of life insurance sustaining demurrers to pleas of breach of warranty with respect to the insured's use of intoxicating liquors, is not prejudicial, even though erroneous, where the jury found for plaintiff under instructions that, if they found insured's answers on that subject to be untrue, they should find for defendant. (*Fla.*) *Insurance Co. v. Fisher*, 188 U. S. 726, 47 L. ed. 667.

- (s) *Error in sustaining a demurrer to a paragraph of an answer, where judgment only one that could have been rendered.*

A judgment will not be reversed because of error in sustaining a demurrer to a paragraph of an answer, where the judgment rendered is the only one that could have been properly rendered under the evidence. Board of Com. of Miami Co. v. Woodring, 12 Ind. App. 173, 40 N. E. 31.

- (t) *Sustaining demurrer to paragraphs of answer in suit on note for patent right, the burden being on plaintiff to prove that he purchased in good faith, without notice.*

In an action on a note by indorsers before maturity, the answer alleged in paragraph 3, that the consideration for the note was a patent right, and the note did not state that it was given for a patent right, "by reason of which failure and omission said note was and is null and void." In paragraph 4, he alleged the same facts, and also that plaintiffs had knowledge of such facts when they purchased. A demurrer was sustained to paragraph 3, and overruled to paragraph 4. Held, that since the burden was on plaintiffs to prove that they purchased in good faith, without notice, and the additional averment of notice in paragraph 4 was unnecessary, the error in sustaining the demurrer to paragraph 3 was harmless. Bunting v. Mick, 5 Ind. App. 289, 31 N. E. 378, 1055, overruled, Kniss v. Holbrook, 16 Ind. App. 229, 44 N. E. 563, 734, 2 judges dissenting.

- (u) *Where no personal judgment is entered, sustaining demurrer to an answer setting up discharge in bankruptcy is harmless.*

Where no personal judgment is entered against the defendant, error in sustaining a demurrer to an answer stating his discharge in bankruptcy was a bar to a personal judgment is harmless. Losey v. Bond, 94 Ind. 67.

(v) *Sustaining demurrer to answer alleging unconstitutionality immaterial, as question could have been raised without pleading.*

Where a paragraph of an answer alleged that a certain ordinance was unconstitutional, the cause having originated in a mayor's court, the sustaining of a demurrer to the answer was harmless error, inasmuch as the validity of the ordinance could have been raised without a pleading. *Berkey v. City of Elkhart*, 141 Ind. 408, 40 N. E. 1081; *Kelly v. City of Crawfordsville*, 141 Ind. 705, 40 N. E. 1082.

(w) *Error in sustaining demurrer to special paragraph of an inconsistent answer.*

In an action on a note and to foreclose a mortgage securing the same, certain defendants jointly answered, in one paragraph disclaiming any interest in judgments which they were alleged to have recovered against the mortgagor, for the reason that they had, in good faith, assigned their interests in them. In another paragraph of the answer the same defendants denied the allegations of the complaint. Held, that the answers were not inconsistent, and any error in sustaining a demurrer to the said paragraph was harmless. *Sanders v. Farrell*, 83 Ind. 28.

(x) *Sustaining demurrer to special defense, where it could not have been proved.*

Where defendant, after a demurrer to his defense was sustained, went to trial on his general denial, and appeals from the judgment against him, bringing to the court of appeals a bill of exceptions and states the evidence, which shows that the allegations of the special defense could not possibly be proved, the judgment will not be reversed on the ground of error in sustaining the demurrer. *Clemons v. Knox*, 31 Mo. App. 185.

(y) *Sustaining demurrer to plea which tends to confuse the issues being tried may not be material error.*

A plea that tends to confuse the issues being tried may be stricken; therefore, sustaining a demurrer to such a plea may not be material error. Poppell v. Culpepper, 56 Fla. 515; Ray v. Pollock, 56 Fla. 530.

(z) *Sustaining demurrer to defense of coercion immaterial.*

Burns's Revised Statutes 1894, secs. 7107, 7110 (Horner's Revised Statutes 1899, secs. 5226, 5229), permit the defendant, in actions in the circuit court, by a landlord against a tenant for unlawful detainer, to avail himself, without pleading, of all defenses allowed without plea, in civil actions before justices of the peace. Burns's Revised Statutes 1894, sec. 1528 (Horner's Revised Statutes 1897, sec. 1460), provides that in civil actions before justices of the peace all matters of defense, except the statute of limitations, set-off, and matters in abatement, may be shown in evidence without pleading. Held, that the order of the court in such case sustaining a demurrer to a defense of coercion was not prejudicial error, since such defense was available without pleading. Ward v. R. Co., 25 Ind. App. 405.

(a-1) *Erroneously sustaining a demurrer to a counterclaim immaterial, the subject matter thereof being subsequently settled.*

Sustaining a demurrer to a counterclaim is not error, if the subject matter of it is subsequently settled. Matthews v. Davis, 39 O. S. 54.

(b-1) *Plea presenting no defense, sustaining demurrer thereto was harmless.*

Where the court adjudges that a plea presents no defense and sustains a demurrer thereto, the error in entertaining a demurrer, which may be treated as a motion to strike, is harmless. Sutherland v. Bank (Va. Sup.), 69 S. E. 341.

(c-1) *Sustaining demurrer where plea's defect was incurable.*

Where a plea attacked by a general demurrer could not have been amended so as to cure the defect, the court's error in sustaining the demurrer was harmless. *Deleon v. Walter* (Ala. Sup.), 50 S. 934.

(d-1) *Where defendant files an amended answer he elects to change his defenses, and after trial thereon, can not complain of error in sustaining demurrer to original answer.*

A defendant, by availing himself of the leave of the court to amend answers which have been pronounced insufficient in law upon demurrer, elects to change his defenses, and the sufficiency of the original answer as a defense to the action is not brought up for review by this court upon an appeal from a final judgment rendered for the plaintiff upon the amended answer. *Forcheimer v. Holly*, 14 Fla. 239.

(e-1) *Sustaining demurrer to a cross-complaint, where matter could be shown under the answer.*

There was no reversible error in sustaining a demurrer to a cross-complaint, where the matter set up therein could be shown under the answer. *Coyne v. Baker* (Cal. App.), 84 P. 269.

(f-1) *As under the code new matter alleged in an answer is deemed controverted by the plaintiff, sustaining a demurrer to a cross-complaint was harmless.*

As by the Code of Civil Procedure, sec. 462, new matter in an answer is deemed controverted by plaintiff, it presents an issue substantially the same as would be presented by the answer to a cross-complaint alleging the same matter, and in such a case where findings were waived in a trial to the court, the presumption being that it found on all matters of fact in issue necessary to support the judgment for plain-

tiff, and hence found against the defendant as to the new matter alleged in the answer, error, if any, in sustaining a demurrer to the cross-complaint alleging such new matter, was harmless. *Insurance Co. v. Ross*, 131 Cal. 8, 63 P. 67.

(g-1) *Sustaining demurrer to answer setting up breach of warranty not shown by the evidence.*

Where no warranty is shown by the evidence, error in sustaining a demurrer to a paragraph of the answer setting up a breach of warranty is harmless. *Bowman v. Clemmer*, 50 Ind. 10.

(h-1) *Where demurrer challenged an entire pleading, and not each paragraph, not prejudicial to sustain it to one paragraph only.*

Where a demurrer challenged an entire pleading, and not each paragraph separately, it was not prejudicial to sustain it to one paragraph only, though the demurrer was so defective in form that it could have been disregarded. *Goldsmith v. Chipps*, 154 Ind. 28, 55 N. E. 855; *Wray v. Wray*, 32 Ind. 126; *Feiker v. Andrews*, 94 Md. 46, 50 A. 407.

(i-1) *Where two paragraphs of a reply were substantially alike, sustaining a demurrer to one of them was not available as error.*

Where two paragraphs of a reply were substantially the same, each alleging that a certain settlement was fraudulently procured, and one of such paragraphs remains on file, there was no available error in the sustaining of a demurrer to the other, whether it was good or bad. *Mason v. Mason*, 102 Ind. 38, 26 N. E. 124.

Sec. 15. Demurrers undecided.

(a) *A party, to whose pleading a demurrer has been interposed, is not injured by the court failing to pass thereon.*

A party to whose pleading a demurrer has been interposed,

is not injured by the court's failure to pass on the demurrer. *McCarthy v. Yale*, 39 Cal. 585; *Bird v. McElvaine*, 10 Ind. 40; *Gray v. Mankin* (W. Va. Sup.), 72 N. E. 648. Nor an exception well taken where the petition presents a substantial cause of action. *R. Co. v. Stewart*, 59 Ky. (2 Metc.) 119.

Sec. 16. Departures in pleading.

- (a) *Departure in pleading immaterial where correct decision has been reached.*

Where a correct decision has been reached the appellate court will not reverse the judgment because of a departure in the pleading, such as where plaintiff declared on an original promise, and after pleading the bankruptcy replied on a new promise. *Bank v. Flint*, 17 Vt. 508, 44 Am. Dec. 351.

- (b) *Departure in a reply, where the facts are all provable under the answer to the cross-complaint.*

A departure in a reply is harmless, where the facts are all provable under the answer to the cross-complaint. *Carter v. Carter*, 35 Ind. App. 73, 72 N. E. 187.

- (c) *New matter in the reply constituting a departure from the petition.*

A judgment will not be reversed because new matter in a reply constituted a departure from the petition, though timely objection was made in the trial court, where notwithstanding the fault, the contention of each party was made clear, and each had full opportunity to develop the facts. *Savage v. Modern Woodmen of America*, 84 Kan. 63, 113 P. 802.

Sec. 17. Election in pleading.

- (a) *Error in requiring election between allegations not prejudicial.*

Although the court below erred by requiring a party to

elect between different allegations in his pleading, yet if he acquiesced and made an election, and confined his offers of proof to one allegation, and the record in no way shows that he was in a condition to have introduced evidence under others, the supreme court will not reverse for the error, for it does not appear to have caused any prejudice. *McDiarmid v. Caruthers*, 34 Mich. 49; *California Fruit Ass'n v. Lilly* (Wash.), 184 F. 570, 106 C. C. A. 550; *Boyer v. Richardson*, 52 Neb. 156, 1 N. W. 981; *Conroy v. Town of Clinton*, 158 Mass. 318, 33 N. E. 525; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499.

(b) *Not error to overrule motion to require election, where the three counts state but one cause of action.*

Where a petition, in form, states three separate causes of action, which might have been stated as one cause of action, and the court treats the petition as stating one cause of action, and tries the case and renders a decree on that theory, there is no reversible error in overruling defendants' motion to elect and their objection to the introduction of any evidence. *Rinehart v. Long*, 95 Mo. 396, 8 S. W. 559; *Freet v. R. Co.*, 63 Mo. App. 548; *Shenners v. R. Co.*, 74 Wis. 447, 43 N. W. 103; *Taylor Co. v. Standley*, 79 Iowa 666, 44 N. W. 911.

(c) *Failure to require earlier election upon count not prejudicial error.*

Where a plaintiff set up in his petition three counts based on the same transaction, and, at the close of the testimony, elected to stand on one of the counts, and the case was submitted to the jury as a single cause of action, the refusal of the court to require an earlier election was not prejudicial error. *Edwards v. Hartshorn*, 72 Kan. 19, 82 P. 520, 1 L. R. A. n. s. 1050.

- (d) *Refusal to compel election, where proof confined to one count.*

A refusal to compel plaintiff to elect between two causes of action is harmless error, when he is limited by the court to proof of one only. *Pinnell v. St. Louis R. Co.*, 49 Mo. App. 170; *Gardner v. Crenshaw*, 122 Mo. 79, 27 S. W. 612.

- (e) *Erroneously requiring election between a defense and a counterclaim.*

In an action on a contract, though it was probably error to require defendant to elect between the defense in her answer and a counterclaim, on the ground that they were inconsistent, it was harmless, where she abandoned the counterclaim, which was invalid by reason of not being properly pleaded. *Societa Italiana, etc., v. Sulzer*, 138 N. Y. 468, 34 N. E. 193.

- (f) *Error in requiring election between counts in tort and in contract.*

When a cause of action in tort and one in contract are improperly blended, but no objection is made thereto until after the plaintiff's proof is introduced, and it appears that the case was determined wholly on the theory of a breach of contract, error in overruling a motion to require plaintiff to elect is harmless. *Coyle v. Baum*, 3 Okl. 695, 41 P. 389.

- (g) *Refusal to compel election between trespass and conversion.*

Where defendant's motion to compel plaintiff to elect between causes of action in trespass for cutting timber and for conversion of timber, both of which were supposed to be stated in the complaint, was denied, but the court construed the complaint in its instructions as stating only a cause of action for trespass, the error in refusing to compel the election was harmless, since any judgment on the complaint in

trespass would bar another action for "conversion." Ky. Stave Co. v. Page (Ky. Ct. App.), 125 S. W. 170.

(h) *Error in not requiring plaintiff to elect, where plaintiff failed to get a verdict against consignees.*

The error in refusing to require plaintiff to elect which cause of action he would prosecute is harmless, as there was a verdict for the consignees, on the ground that they had not ordered or received the goods, and against the carrier, on the ground that there had been a misdelivery, and if there should be another trial exactly the same issue would be presented as between the plaintiff and the carrier that had already been determined, the consignees being no longer parties. R. Co. v. Ft. Wayne Electric Co., 108 Ky. 113, 21 Ky. L. R. 1544, 55 S. W. 918.

(i) *Refusal to require election between two causes of action cured by refusing evidence on one and proper instructions.*

In an action against a railroad company for damages sustained by reason of a railroad fence being insufficient, so that it permitted hogs to pass through it and onto plaintiff's field, and the petition claimed that the hogs damaged plaintiff's crop in a specified sum, and also alleged that, by reason of the hogs being in the field and his efforts to save the crop, he had been bound to expend in timber, and labor and feed, an additional sum. Held, that the ruling of the court in refusing to require plaintiff to elect on which of the two causes of action he would proceed to try, if erroneous, was not prejudicial to defendant, where plaintiff was not permitted to give any evidence of damages other than those arising from the destruction of the crop, and the court, by its instructions, expressly confining the jury in the estimation of damages to the injuries done to the crop. Pinnell v. R. Co., 49 Mo. App. 170.

- (j) *Error in requiring election between two causes of action, when that rejected did not state a cause of action.*

Error of the court in requiring plaintiff to elect as to which of two causes of action he would rely on, is not ground for reversal where the cause of action on which plaintiff did not rely, on exercising his election, did not state a cause of action. *Macleod v. Skiles*, 81 Mo. 595, 51 Am. Rep. 254.

- (k) *Refusal to require election, where plaintiff dismissed one of his two causes of action.*

The denial of defendant's motion to require plaintiff to elect between two counts sued on, if error, is harmless where at the trial, plaintiff dismissed as to one of the counts, and went to the jury on the other only. *Gardner v. Crenshaw*, 122 Mo. 79, 27 S. W. 612.

- (l) *Error in requiring election whereby plaintiff abandoned an amended petition, where original presented all the issues.*

Where plaintiff abandoned an amended petition, by reason of an order requiring him to elect, the error in requiring an election was harmless, as the original petition embraced all that was covered by the amendment, and proof was taken on all the issues. *Estep v. Hammons*, 104 Ky. 144, 20 Ky. L. R. 448, 46 S. W. 715.

- (m) *Error in granting motion to elect, where plaintiff not entitled to the relief in either case.*

Possible error in granting a motion to require plaintiff to elect whether he will sue as trustee or as receiver is harmless, where it does not appear that he would be entitled to the same relief in either capacity. *Shepard v. Bank*, 149 Ind. 532, 48 N. E. 346.

- (n) *Error in election on counterclaim cured by issue made on reply.*

The error, if any, in requiring defendant to elect upon which of two paragraphs of his counterclaim he would proceed, was harmless, where plaintiffs, after the ruling was made, put in issue by his reply all the allegations of both paragraphs, pleading affirmative matter in avoidance, and this reply was taken as controverted by consent, and, on the trial, proof was allowed as to the whole matter. *Asher v. Tomlinson*, 22 Ky. L. R. 1494.

Sec. 18. Estoppels.

- (a) *Trying issue of estoppel not presented by the pleadings.*

Although the sole issue presented by the pleadings was whether appellant was a member of the partnership sought to be charged. The only issue presented by the instructions to the jury was, whether appellant was estopped to deny that she was a partner by having held herself out as such. The evidence conduced to show both a partnership and an estoppel. Held, that the whole record goes to show that the litigants did not regard it as necessary to plead an estoppel, there being no objections to the evidence offered under that subject, and it would be useless to reverse the judgment so that the parties might, on formal pleadings, try an issue which has been fully tried. *Cavanaugh v. Weber*, 11 Ky. L. R. (abst.) 858.

- (b) *Where defendant must have known what the contract was, estopped to complain of denial of motion to make definite.*

Where the defendant was the party who executed the contracts in suit, and acknowledged over his signature that he was to pay for services to be rendered, so that he must have known what the contract was he was not prejudiced by refusal of a motion to make the complaint more definite

and certain, although the complaint was very general with respect to the services which were to be rendered. *Mulligan v. Smith*, 32 Col. 404, 76 P. 1063.

- (c) *Error in striking out plea of estoppel by judgment, cured by plaintiff putting the judgment roll in evidence.*

Error in striking from a complaint a plea of estoppel by judgment was harmless, where plaintiff subsequently put the judgment roll in evidence. *Jacob v. Day*, 111 Cal. 571, 44 P. 243.

- (d) *Error in submitting estoppel when fact otherwise proved.*

The error in submitting a question of estoppel to the jury held not prejudicial, when the effect of the estoppel, if it had been proven, would be to establish a fact which was otherwise proven. *Bartlett v. Insurance Co.*, 77 Iowa 155.

- (e) *Devisee who leased land so acquired estopped to contest will.*

A daughter who went into possession of land devised to her by the will of her father, and leased the land and collected the rents under the lease from the date of the probate of the will, is estopped thereby from contesting the validity of the will; and, having full knowledge of the condition of the estate and the terms of the will, she can not raise the bar so erected by a surrender to the executor of the rents so received, or by bringing the money into court, but the acceptance of the devise remains an absolute bar to a contest by her of the validity of the will, and where such an action has been brought by a devisee so situated its dismissal by the trial court is not error. *Leedy v. Cockley*, 14 O. C. C. n. s. 72, 22 O. C. D. 299.

- (f) *Where a purchaser of land assumes the payment of mortgage thereon securing notes of the grantor, he is estopped from denying the right of the corporation to sue thereon.*

Where a purchaser of land assumes the payment of a mortgage thereon securing notes of the grantor to a corporation against the purchaser of the notes, his privity with the grantor, who is estopped from denying the corporation's right to sue, and his payment of interest on the notes, render the admission in evidence of unsigned articles of incorporation harmless error. *Stuyvesant v. Western Mortgage Co.*, 22 Col. 28, 43 P. 144.

- (g) *One who offers testimony can not complain of its admission.*

One who offers testimony is estopped to complain of its admission. *Wallace v. Collins*, 5 Ark. 41.

Sec. 19. Failure or refusal to strike from pleadings.

- (a) *Refusal to strike part where remainder of complaint states a cause of action.*

A judgment will not be reversed for error of the court below in refusing to strike out part of a complaint, where the remaining part of the complaint states a cause of action. *Sim v. Hurst*, 44 Ind. 579.

- (b) *Failure to strike out irrelevant matter from a complaint which did not supply the basis of the judgment.*

Error in refusing to strike out part of a complaint as irrelevant is not available, where such part does not supply the basis of the judgment. *Harte v. Songer*, 138 Ind. 161, 37 N. E. 595; *Johnson v. Brown*, 130 Ind. 534, 28 N. E. 698; *Judd v. Trustees of Vincennes University*, 23 Ind. 272; *Conner v. Andrews Land & Home Imp. Co.*, 162 Ind. 338,

70 N. E. 376; Sloane v. R. Co., 111 Cal. 668, 44 P. 320; Merriles v. R. Co., 163 Mo. 470, 63 S. W. 718; Thomas v. Concordia Cannery Co., 68 Mo. App. 350; Bennett v. Bank, 61 Mo. App. 297. Failure to strike special defense where same allowable under the general denial. Fulkerson v. Mitchell, 83 Mo. 13; Hill v. Atterbury, 88 Mo. 114. Failure to strike out irrelevant unprejudicial matter. Long v. Newhouse, 57 O. S. 348. So of failure to strike out immaterial redundant or irrelevant matter. R. Co. v. Marks, 11 Okl. 82, 65 P. 996; Ida Co. v. Woods, 79 Iowa 148.

(c) *Refusal to strike paragraphs as to exemplary damages when jury instructed there could be no recovery thereon.*

Refusal to strike from complaint paragraphs as to exemplary damages, if erroneous, is harmless, where the jury was instructed that there could be no recovery of exemplary damages. San Juan Light & Transit Co. v. Requena (Porto Rico), 224 U. S. 89.

(d) *Erroneously overruling motion to strike out, where neither instructions were given nor evidence received under such matter.*

Though the court improperly overrules a motion to strike out portions of the answer, the error is harmless where no evidence is adduced or instructions given respecting the objectionable matter. Musser v. Hill, 17 Mo. App. 169.

(e) *Where answer amounts to a general denial failure to strike reply did not prejudice defendant.*

Although the answer was, in general effect, a mere denial of the allegations of the petition, to which no reply was necessary, yet the failure of the court to strike out such reply was not prejudicial to defendant. Farrell v. Insurance Co., 66 Mo. App. 153.

(f) *Refusal to strike matter from a reply avoiding a release.*

Where, in an action for injuries to the servant of a railroad company, caused by the negligence of a fellow-servant, the company relied on the servant's contract of release, and the reply alleged matters avoiding the contract, a refusal to strike out such matters in the reply was not prejudicial to defendant; since, though the matters had been stricken out, defendant could offer the contract in evidence, and plaintiff could raise the question of its illegality. *Shohoney v. R. Co.*, 231 Mo. 131, 132 S. W. 1059.

(g) *Failure to strike out a reply consisting of argumentative denials was harmless.*

An assignment of error for refusing defendant's motion to strike out plaintiff's reply, because it consisted of argumentative denials, was not well taken; since, if it consisted of argumentative denials, error in not striking it out was harmless. *Home Ins. Co. v. Sylvester*, 25 Ind. App. 207, 57 N. E. 991; *Falksken v. Farrington* (Neb. Sup.), 118 N. W. 1087.

(h) *In action by widow against liquor dealer for injuries to her means of support, refusal to strike out reference to death of husband.*

In an action by a widow against a liquor dealer, under Civil Damage Act (Code 1906, chap. 32), sec. 26, for injuries to her means of support from the illegal sale of liquors to her husband, the refusal to strike out of the declaration, reference to the death of her husband was not error, though no damages could be given for injury to her means of support by the death of her husband, where the rights of the defendant were not prejudiced. *Pennington v. Gillespie*, 66 W. Va. 643, 66 S. E. 1009.

(i) *Failure to strike cured by instructions to jury.*

Failure to strike out an objectionable pleading is harmless error, where the injury was afterwards cured by the instructions of the court. *Cravens v. Gillkian*, 73 Mo. 524.

(j) *Failure to strike out one of two identical paragraphs of a complaint.*

If two paragraphs of a complaint are identical, it is harmless error to refuse to strike out one of the paragraphs, on motion, for that reason. *R. Co. v. Hendricks*, 41 Ind. 48.

Sec. 20. Failure to make definite and certain.

(a) *Failure to require petition to be made definite.*

In an action against a railroad company to recover damages resulting from fire which was negligently permitted to escape from a passing locomotive and train, plaintiff stated in his petition as definitely as he can the train from which and the time when the fire escaped, but the failure of the court to require such definite statement, where no prejudice results to the defendant, is not reversible error. *R. Co. v. Merrill*, 40 Kan. 404, 19 P. 793; *City of Atchison v. Riggle*, 6 Kan. App. 5, 49 P. 616.

Sec. 21. Failure to serve copy of cross-complaint on plaintiff.

(a) *Failure of defendant to serve plaintiff with a copy of cross-complaint, as required by statute.*

Code of Civil Procedure, sec. 142, provides that defendant's cross-complaint asking affirmative relief to the transaction sued on must be served on the parties affected thereby. Held, that, where none of the rights of one of the parties were prejudiced by defendant's omission to serve a copy of a cross-complaint on him, such failure was not ground for reversal. *Mackenzie v. Hodgkin*, 126 Cal. 591,

77 Am. St. Rep. 209, 59 P. 36; *Hodgkin v. Williams*, 126 Cal. 591, 77 Am. St. Rep. 209n, 59 P. 36.

Sec. 22. Insufficiency of cause of action.

(a) *Where complaint is insufficient errors are immaterial.*

In an action in which the complaint was insufficient to sustain a judgment against defendants, any errors in ruling on demurrers to the answer or in denying plaintiff's motion for a new trial were harmless. *Southern Ind. Loan & Sav. Inst. v. Roberts*, 42 Ind. App. 653, 86 N. E. 490; *Clifford v. Drake*, 14 Ill. App. 75; *Williamson v. Richardson*, 22 Ky. (6 B. T. Mon.) 596; *Piper v. Johnston*, 12 Minn. 60 (Gil.) 27.

(b) *Erroneous instructions where no right of action exists.*

A judgment will not be reversed on appeal by the plaintiff for error in instructions, where it appears that the plaintiff has no right of action, and could not have recovered under any instructions. *McQuaid v. R. Co.*, 78 Ill. App. 673.

(c) *Omitted facts essential to a cause of action supplied by proof at the trial.*

Where the plaintiff omits facts essential to a cause of action, but which might be supplied by amendment under Code, sec. 173, before or after judgment, and these facts are proved at the trial, after the judge has refused to dismiss the complaint, the defective statement is not ground for appeal to this court. *Lounsbury v. Purdy*, 18 N. Y. 515.

(d) *Defective statement immaterial if cause of action is sufficiently stated.*

When a petition contains facts sufficient to constitute a cause of action, it is not ground for reversal that the facts are defectively stated. *Bethel v. Woodworth*, 11 O. S. 393; *Youngstown v. Moore*, 30 O. S. 133.

Sec. 23. Intervention, petition of.

- (a) *Permitting petition of intervention while the case was under advisement.*

Error in permitting a petition of intervention while the case was under advisement will not be reviewed on defendant's appeal, where they were in no wise injured by the appearance, and had no concern with the conflicting claims, if any, between the intervenor and plaintiff. *Ashton v. Penfield* (Mo. App.), 135 S. W. 938.

- (b) *Refusing intervention cured by defending in the name of his predecessor in interest.*

Error in refusing to allow one to intervene is cured by allowing such person to defend in the name of his predecessor in interest. *Muller v. Cary*, 58 Cal. 538, 542.

- (c) *Failure to rule on petition for intervention.*

Where the petition for intervention states nothing entitling the intervenor to become a party to the suit, the failure of the court to rule upon such petition, although erroneous, will not justify the reversal of the judgment. *Welborn v. Eskey*, 25 Neb. 193; 40 N. W. 959.

Sec. 24. Minors.

- (a) *In action for death at railroad crossing, admitting evidence that two of deceased's children had died prior to their father.*

In an action for the death of a person at a railroad crossing, error in admitting evidence to show that two of the deceased's children had died in childhood prior to the death of their father, in order to show who were next of kin, was harmless. *Zetsche v. R. Co.*, 238 Ill. 240, 87 N. E. 412, *affm'g*, 143 Ill. App. 428; *Schlerth v. R. Co.* (Mo.), 19 S. W. 1134; *Soeder v. R. Co.*, 100 Mo. 673, 13 S. W. 714,

18 Am. St. Rep. 724; *Bolr v. R. Co.*, 101 Minn. 314, 112 N. W. 267; *Eaff v. R. Co.* (Wash. Sup.), 126 P. 533; *Barker v. R. Co.*, 51 W. Va. 423, 41 S. E. 148, 90 Am. St. Rep. 808.

(b) *Instruction that the disability of coverture or infancy of one co-tenant extends to protect others against running of limitations.*

Where plaintiffs, claiming as heirs of decedent, were required to show an ouster by decedent of defendants and an adverse holding against them for twenty years, defendant's ouster and holding appearing in favor of decedent, and the evidence only justified the inference that decedent entered and held possession by virtue of his marital rights, the error in an instruction that the disability of coverture or infancy of one co-tenant extends to the protection of others against the running of limitations, was not prejudicial to plaintiffs. *Sibley v. Sibley*, 88 S. C. 174, 70 S. E. 615.

(c) *Failure on reaching majority to amend by dropping name of next friend.*

Where, in an action for injuries to a minor, brought by his next friend, the minor, because of age before trial, his failure to make an amendment of the record by striking out the name of the next friend, on his arrival of age being suggested, was not prejudicial to defendant, plaintiff having recovered a judgment, including costs. *Bernard v. Pittsburgh Coal Co.*, 137 Mich. 279, 11 D. L. N. 246, 100 N. W. 396.

(d) *Action for injuries to ward's land, brought in the name of the guardian, did not affect a substantial right of defendant.*

Since a guardian had power to sue for injuries to the ward's land in the ward's name, the fact that the action was erroneously brought in the name of the guardian, in-

stead of in the name of the ward, by the guardian, did not affect the substantial rights of the defendant, since the ward was bound by the judgment notwithstanding the defect. *R. Co. v. Wiar*, 144 Ky. 216, 138 S. W. 255.

- (e) *Allowing the children to join with the widow to recover for injury to husband's reputation by a malicious prosecution.*

While the widow could have sued alone as community survivor to recover for injury to her husband's reputation and feelings by a malicious prosecution against him, it was not reversible error to allow the children to prosecute the action with her. *R. Co. v. Groseclose* (Tex. Civ. App.), 134 S. W. 736.

- (f) *Failure of appellant's guardian ad litem to specifically deny "all" the material allegations of the complaint.*

Where all the material allegations were proved, and the decree was not based on the failure of the answer of appellant's guardian ad litem to specifically deny "all" the material allegations of the complaint, appellants were not prejudiced by such omission. *Cannon v. Lunsford*, 89 Ark. 64, 115 S. W. 940.

- (g) *Citation to have guardianship letters revoked that did not contain "a brief statement of the nature of the proceeding."*

That the citation of an order of the court, on a petition to have letters of guardianship revoked, and a new guardian appointed, did not contain "a brief statement of the nature of the proceeding," as required by Code of Civil Procedure, sec. 1707, can not be complained of on appeal, the guardian having appeared and fully answered, so that the citation served its purpose. *In re Tilton's Est.* (Cal. App.), 114 P. 594.

- (h) *Permitting foreign guardian of a non-resident ward to defend the action, instead of the court appointing a guardian.*

The action of the court in permitting the foreign guardian of a non-resident infant defendant to defend the action, instead of appointing a guardian as provided by Kirby's Digest, sec. 6023, is at most an irregularity, and does not render the judgment against the infant void, and he is not prejudiced thereby. *Martin v. Gwynn*, 90 Ark. 44, 117 S. W. 754.

- (i) *Failure to appoint next friend for minor plaintiff.*

Under Revised Statutes 1899, sec. 672 (Annotated Statutes 1906, p. 686), declaring that a judgment shall not be reversed on the ground that any party under 21 years appeared by an attorney, if the judgment is for him, it is not ground of reversal of a judgment for a minor plaintiff that a next friend was not appointed, or that there was no proof of such appointment, where there was no issue as to it. *Garviston v. R. Co.*, 139 Mo. App. 41, 119 S. W. 481.

- (j) *In an action by infant for injuries, holding that burden of proving plaintiff was sui juris was on defendant.*

In an action by an infant for injuries from being struck by a locomotive while crossing defendant's track, error in holding that the burden of proving that plaintiff was sui juris was on defendant, was not prejudicial. *Judg.* 103 N. Y. Supp. 1142, *affm'd*, *Simkoff v. R. Co.*, 190 N. Y. 256, 83 N. E. 15.

- (k) *Where a girl who lost fingers had been preparing for piano teaching, allowing music teacher to testify as to their earnings.*

Where a girl, 17 years old, sustaining personal injuries, necessitating amputation of one finger on the right hand,

and all the fingers of the left hand at the knuckles, had been preparing herself for becoming a music teacher, by having taken lessons in music on the piano for three years, and she had shown aptitude in music, the error, if any, in allowing her music teacher to testify as to the average earnings of music teachers, was not prejudicial, especially as the questions, as finally put to such teacher, related only to how music teachers were paid, whether by the lesson or pupil, since the prospect to earn money as a music teacher was not; as to her, a mere conjectural possibility. *Murray v. R. Co.* (Iowa Sup.), 133 N. W. 123.

(l) *In action for injuries to minor from defective machinery, sustaining objection to question as to condition of machine on the day of last inspection.*

In an action for injuries to a minor from defective hoisting machinery, plaintiff's expert witness testified that he saw the machinery on the day of the accident, and again six months later, when it was in the same condition except that some strengthening supports had been added, and again nearly a year after the accident, when there had been no change beyond wedging and bracing. Held, that sustaining an objection to plaintiff's question as to what was the condition of the machine on the day of last inspection was harmless error. *Luman v. Golden Ancient Channel Min. Co.*, 140 Cal. 700, 74 P. 307.

(m) *In action for selling liquor to plaintiff's minor son, admitting testimony that he got liquor in another saloon cured by charge that such evidence was immaterial.*

On the trial of an action for damages for selling liquor to plaintiff's minor son, error, if any, in allowing one of the defendant's witnesses to testify that he had drunk with the minor at a saloon other than defendant's, was cured by a charge that it was immaterial whether anyone else than

defendant gave liquor to the minor, and that the damages could not be lessened by reason of that fact. *Sterling v. Callahan*, 106 Mich. 128, 63 N. W. 982.

(n) *Erronous admission of testimony to show defendant knew decedent was a minor.*

In an action to recover for the killing of a brakeman in the employ of the defendant company, evidence was admitted to show that the agent of the company who first employed decedent knew he was a minor, in order to charge defendant with that knowledge. Held, that the admission of this evidence, if erroneous, was without prejudice to defendant, where it appeared that servants of defendant, under whose supervision decedent worked, knew he was a minor. *R. Co. v. King*, 2 Tex. Civ. App. 122, 20 S. W. 1014.

(o) *In action for caring for infant, admitting testimony that parents moved in high station in life.*

In an action for caring for and nursing an infant, the admission of testimony that the parents moved in a high station in life, even if improper, is harmless error, where there is evidence otherwise to sustain the finding as to value. *Farr v. Semple*, 81 Wis. 230, 51 N. W. 319.

(p) *Instruction as to measure of damages for death of minor.*

Revised Statutes 1899, sec. 2866, provides that, in an action for the death of a minor, the jury may give such damages as they may deem fair and just to the surviving parties who may be entitled to sue. In an action by parents for the death of a child, the court instructed that the measure of damages was what the child would have earned until he became 21, minus the cost of his support, clothes and maintenance. Held, more favorable to defendant than he was entitled to. *Sharp v. Nat. Biscuit Co.*, 179 Mo. 553, 78 S. W. 787.

- (q) *Instruction requiring the exercise of the greatest caution and skill to prevent injuries to children.*

In an action against a railroad company for injuries to a child run over by a train, an instruction requiring railroad companies to exercise the greatest caution and skill was not prejudicial, it being a mere general declaration of an abstract proposition. *Fricks v. R. Co.*, 75 Mo. 595.

- (r) *In action for personal injury plaintiff relied on infancy to avoid a settlement, charge that it was void from failure to refer to subject of disaffirmance.*

Where, in an action for personal injury, plaintiff relied on infancy to avoid a settlement of the claim, and the evidence showed that the check paid for the settlement was tendered back before the commencement of the action, and that nothing had been received on account of it or the settlement, and that the check was brought into court for the benefit of the defendant, the error in a charge that the agreement was void because of infancy arising from the failure to refer to the subject of disaffirmance was not prejudicial. *Traction Co. v. Maher* (Ind. Sup.), 95 N. E. 1012.

- (s) *In action for injury to a child employed in a laundry, instruction that her employment therein was unlawful.*

In an action for injury to a child employed to operate a laundry mangle, in violation of Act, March 18, 1908 (Kentucky Statutes 331, sec. 11; Russell's Statutes, sec. 3247), it was not prejudicial error to instruct that her employment in the laundry was unlawful, though employment at other work in the laundry would not have been unlawful. *Casperson v. Michaels*, 142 Ky. 314, 134 S. W. 200.

- (t) *Failure to instruct that a child 4½ years old was not bound by a charge defining ordinary care.*

The failure to charge that a child 4½ years old, suing

for a personal injury, by being caught by machinery in the seed room of an oil mill, was not bound by the charge defining ordinary care was not prejudicial to defendant. *Blossom Oil & Cotton Co. v. Possest* (Tex. Civ. App.), 127 S. W. 240.

(u) *Charge authorizing the jury to allow a father such sum for the death of his minor son as would fairly compensate him for the pecuniary loss sustained.*

A charge authorizing the jury to allow a father such sum for the death of his minor son as would fairly compensate him for the pecuniary loss sustained, though technically erroneous, as placing no limitation as to the period of time for which recovery could be had for the loss of services, was not prejudicial to defendant, where no special charge on the subject was requested, and the son's wages up to the time of his majority could not have been less than the amount of the verdict. *Texas & Pacific Coal Co. v. Kowsikowsika* (Tex. Civ. App.), 118 S. W. 829.

(v) *In action to recover for injuries to minor from unguarded rip-saw, charge to consider this on issue of contributory negligence.*

In an action by a nineteen year old boy for an injury from an unguarded rip-saw which he was feeding, his experience at such work covering about 3½ weeks, it is not ground for reversal to instruct that in considering the question of contributory negligence, the jury may consider the plaintiff's age and experience, and whether or not he was an expert in the operation of rip-saws. *Crooke v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 P. 632.

(w) *In an action by a seven year old child for crushing her foot in a car, instruction that sum recovered should not exceed \$25,000.*

In an action by a seven year old girl for the crushing of

her foot by a car, \$25,000 damages were claimed. The court closed his instruction as to the element of damages which might be recovered, by stating "which sum, in no event, to exceed the sum of \$25,000." The verdict was for \$10,000. Held, that the error in mentioning the amount claimed was not reversible. *R. Co. v. Adams* (Tex. Civ. App.), 98 S. W. 222.

(x) *In an action for injuries to minor servant, refusal of instruction on contributory negligence which omitted element of age, experience or understanding.*

In an action for injuries to a minor servant by the door of a freight elevator falling as she was entering the elevator, under the direction of her superior, the court instructed that negligence was not to be presumed from the accident, that the risk of obvious and open dangers was assumed by plaintiff; that defendant was not obligated to warn or instruct her of dangers of such character, and that even if defendant was negligent in requiring plaintiff to ride on a freight elevator, yet if, by ordinary care, she could have avoided the danger she could not recover; and an instruction that the dangers were as open and obvious to plaintiff as to defendant and that the mere fact of minority does not necessarily impose greater care upon the master than in the case of an adult. Held, that from such instructions the jury must have understood that the mere fact of minority was no ground for recovery, and hence, defendant was not prejudiced by the refusal of instructions on contributory negligence which omitted any element of age, experience or understanding. *Daniel v. Johnston* (Col. Sup.), 89 P 811.

(y) *In an action on infant's contract for instruction, finding that the sums paid on the contract exceeded the value of education furnished.*

Where, in an action on an infant's contract for instruction, the infant's counterclaim to recover payments made was dis-

missed, plaintiff was not prejudiced by a finding that the sums paid to it on the contract exceeded the value of any education furnished to defendant. *International Text-Book Co. v. Doran*, 80 Conn. 307, 68 A. 255.

(z) *Vendee not injured by failure to take account of rents and profits in action by vendor, on attaining majority, to rescind sale.*

Though, under certain circumstances, a person who had bought land of an infant might be entitled to have the purchase money paid by him to the infant refunded when the contract is voided by the infant after he attains his majority, yet, as he would have to account to the infant for the rents and profits of the land while in his possession, if the record discloses that such rents and profits must greatly exceed the purchase money paid and interest, and the vendor, who has not asked for a settlement of such account, though ordered, the purchaser can not, in an appellate court, assign as error that the court below did not take an account, charging him with the rents and profits, and crediting him with such purchase money, before it rendered a final decree vacating the sale and putting the vendor in possession, as the vendee is not prejudiced by such failure to settle the account. *Gillespie v. Baily*, 12 W. Va. 70, 29 Am. Rep. 445.

Sec. 25. Misjoinder of actions and defenses.

(a) *Misjoinder of causes of action will not disturb a judgment.*

Misjoinder of causes of action in a complaint is not ground for reversal. *Coan v. Grimes*, 63 Ind. 21; *Pate v. Bank*, 63 Ind. 254; *R. Co. v. Vancleave*, 110 Ky. 968, 23 Ky. L. R. 479, 63 S. W. 22.

(b) *Action on demurrer for misjoinder of actions not ground for reversal.*

Burns's Revised Statutes 1901, Horner's Revised Statutes

1897. provide that, where a demurrer is sustained for misjoinder of causes of action, the court shall order the causes to be separated and each shall stand as a separate action, and that no judgment shall ever be reversed for any error committed in ruling on a demurrer for misjoinder of causes of action; held, that even if the joinder of the widow and her assignee, in an action against her husband's administrator, to recover her statutory allowance, was improper, it was not ground for reversal. *Brown v. Bernhamer*, 159 Ind. 538, 65 N. E. 580.

(c) *Misjoinder of defenses in answer not considered on appeal.*

An objection that there is a misjoinder of defenses in the answer will not be considered on appeal, where one of the defenses was eliminated by a peremptory instruction. *Stark Bros. N. & O. Co. v. Mayhew* (Mo. App.), 141 S. W. 433.

(d) *Misjoinder of action to determine boundary and for price of a slave.*

In an action to determine a boundary, though it is improper to join a claim for the price of a slave, the supreme court will not disturb the verdict, where it appears that substantial justice has been done. *Savage v. Foy*, 7 La. Ann. 575.

Sec. 26. Misnomers.

(a) *Name of one of infant defendants in a suit for the construction of a will wrongly stated in the answer.*

That the name of one of the infant defendants, in a suit for the construction of a will, was wrongly stated in the answer, was not prejudicial, where the interest of the infant was to sustain complainant's construction of the will, which was done by the decree. *Comstock v. Redmond*, 252 Ill. 522, 96 N. E. 1073.

(b) *Designating a pleading an amendment instead of a supplementary pleading.*

A mere misnomer in designating a pleading as an amendment, instead of a supplementary pleading, is immaterial, where the substantial rights of the parties are not thereby affected. *Christofferson v. Wee* (N. D. Sup.), 139 N. W. 689. Likewise misnaming demurrers by calling them "motions to strike." *Wisconsin Lumber Co. v. Green & Western Telephone Co.*, 127 Iowa 350, 101 N. W. 742, 69 L. R. A. 968, 109 Am. St. Rep. 387; *Bank v. Same*, Id.

(c) *Misnomer in selecting, summoning and swearing juror.*

A person who caused himself to be registered as Danish, but was known and called Stevens, was selected, summoned and sworn as a juror under the name of Stevens. Held, that this difference in name by which the party was registered, and the name under which he was summoned and sworn, was not cause to set aside the verdict, where it appears that he was the identical person registered and the person whom the county commissioners selected as a juror. *Shaw v. Newman*, 14 Fla. 128.

(d) *Misnaming of member of firm in some of the papers in the case.*

It is not ground for reversing a judgment against a firm that in some of the later papers in the case one of the members whose name is "Hannon," was called "Harmon." *Bank v. Farwell* (Kan.), 56 F. 570, 6 C. C. A. 24.

(e) *Court in its charge giving the wrong name of a witness.*

Where the jury could not be misled by a mistake of the court in the name of a witness whose testimony was referred to in the charge, the supreme court will not reverse for such mistake. *R. Co. v. Peters*, 116 Pa. St. 206, 9 A. 317.

Sec. 27. Notice (including judicial).

- (a) *One having actual notice not prejudiced by evidence of constructive notice of mortgage.*

A defendant, who is shown by uncontradicted testimony to have had actual notice of a mortgage constituting a chain in plaintiff's title to the property sued for, is not prejudiced by the erroneous admission of evidence tending to show constructive notice. *Stanton v. Estey Mfg. Co.*, 90 Mich. 12, 51 N. W. 101.

- (b) *Exclusion of evidence to prove constructive notice cured by actual notice.*

A party seeking to charge a municipal corporation with negligence, is not prejudiced by the exclusion of evidence tending to show constructive notice, where actual notice is conceded to have been received. *Allison v. Village of Middletown*, 27 Weekly Dig. (N. Y.) 21, 10 St. Rep. 421.

- (c) *Evidence of a matter of which the court take judicial notice.*

Evidence of matter of which the court take judicial notice is harmless. *Whitney v. Jasper Land Co.*, 119 Ala. 497, 24 S. 259.

- (d) *Court take judicial notice of a state statute.*

Where an action for wrongful death, under Kentucky L. 1909, sec. 6 (Russell's Statutes, sec. 11), conferring such right of action, was removed to the federal court sitting in Massachusetts, defendant was not prejudiced by the fact that the circuit court took judicial notice of the Kentucky statute, and that it was not introduced in evidence, it appearing on appeal that the statute noticed was identical with that presented by defendant to the court of appeals. (*Mass.*) *R. Co. v. De Valle Da Costa*, 190 F. 689, 111 C. C. A. 417.

- (e) *Exclusion of notice served on plaintiff in action against informants on inquisition of insanity.*

In an action by a person alleged to be insane against the informants on an inquisition of insanity, for wrongfully depriving him of his liberty, error of the court in excluding the notice served on the plaintiff in proceedings in the probate court, and which was defective and void on its face was harmless, where plaintiff had appeared in the proceedings. *Crow v. Meyersieck*, 88 Mo. 411.

- (f) *Admission of unnecessary proof of notice.*

The admission of evidence to prove notice is not ground for reversal, where the party notified is by law charged with notice. *R. Co. v. Crawford*, 68 Ill. App. 355.

- (g) *Erroneous charge that notice to master-mechanic of incompetency of an engineer was notice to railroad company.*

An erroneous instruction that notice to a master-mechanic of the incompetency of an engineer is notice to the railroad company, affords no cause for reversal of a judgment for personal injuries received by a brakeman on account of the negligence of the engineer, when there was no proof that the master-mechanic had any notice of such incompetency. *R. Co. v. Wright*, 100 Tenn. 56, 42 S. W. 1065.

- (h) *Instruction requiring notice that company would no longer be security for toll.*

In assumpsit on a partnership contract to pay toll for a line of coaches owned by strangers, defendants contended that there had been a dissolution of the firm, and that plaintiffs knew that the contract was not binding. The court, on the question of liability, submitted the issue of the dissolution and notice thereof, but erroneously stated that the

contract would stand good notwithstanding, unless there was an express notice given by the firm that it would no longer be security for the toll. The jury found that plaintiffs had no notice at all of the dissolution. Held, that the misdirection to the jury was not ground for a new trial, since without prejudice. Princeton, etc., Turnpike Co. v. Gulick, 16 N. J. L. 161.

(i) *Mere shortness of time for the hearing will not reverse.*

A commissioner appointed to take an account gave the defendant three days' notice of the date fixed for proving claims against him. Held that, while the notice was too short, the judgment would not be reversed, as it did not appear that defendant was prejudiced thereby. Moore v. Bruce, 85 Va. 139, 7 S. E. 195.

(j) *Erroneous instruction as to actual notice cured by finding by jury of constructive notice.*

An erroneous instruction in regard to actual notice to a city of a defect in its sidewalks is without prejudice, where it appears that the plaintiff relied upon proof of constructive notice to the city of such defect, and that the jury determined the question of negligence wholly from the proof of such notice. City of Bedford v. Woody, 23 Ind. App. 231, 53 N. E. 838.

(k) *Instruction that there must be reasonable notice, no less than thirty days, to terminate a tenancy from month to month, was favorable to the tenant.*

An instruction that there must be a reasonable notice, not less than thirty days, to terminate a tenancy from month to month, is sufficiently favorable to the tenant, because it leaves the jury to find that a thirty-day notice is insufficient. Laurens Telephone Co. v. Bank, 90 S. C. 50, 72 S. E. 878.

Sec. 28. Parties to actions.

- (a) *Failure to dismiss suit for misjoinder of plaintiffs and of causes of action.*

On appeal in equity, failure of the court to dismiss a suit for misjoinder of plaintiffs and of causes of action does not require a reversal, where the record clearly shows appellants were in no wise prejudiced. *Hamilton v. Allen*, 86 Neb. 401, 125 N. W. 610.

- (b) *In action on benefit certificate, joining the eligible and ineligible beneficiaries as plaintiffs.*

Where, in an action on a benefit certificate, the eligible and ineligible beneficiary sued jointly, and the defense was that the certificate was void, and that the eligible beneficiary was entitled to not more than one-half of the fund, the joining of the ineligible beneficiary was not injurious to defendant. *Cunat v. Supreme Tribe of Ben Hur*, 249 Ill. 448, 94 N. E. 925.

- (c) *Irregularity in interpleading two persons.*

Any irregularity in interpleading two persons held not prejudicial, where judgment was rendered against neither. *Barnett v. Max L. Typermass & Co.*, 133 N. Y. Supp. 454.

- (d) *Intervenor regarded in court, though not formally made a party.*

That a person who comes into a suit, in which an attachment has issued, by petition, in which he disputes the validity of the attachment, sets up claim to the attached property, and prays to be and is ordered by the court to be made a party, was never in fact formally made a party, is not ground for reversal, where he was regarded by the court and the plaintiff (who complains of the irregularity) as a party in court, and the action proceeded in all respects as if he had been made a party. *Schwein v. Sins*, 59 Ky. (2 Metc.) 209.

- (e) *Failure to make purchaser of land a party defendant not cause for a new trial.*

Where land, while the title was in suit, was purchased by a party who, though not made a co-defendant with his tenant, had his deed in evidence on the trial, and had the full benefit of any defense he was able to set up. Justice was done by the verdict of the jury. Held, that the case would not be remanded for a new trial on the ground that the landlord was not made a party defendant. *Roe v. Doe*, 36 Ga. 611.

- (f) *Erroneous presence of representative of deceased co-obligee of negotiable bonds as party.*

Since the survivor of co-obligees of negotiable bonds may maintain an action thereon, without joining the representative of a deceased co-obligee, the presence of the personal representative of such deceased co-obligee, as party, though erroneous, was harmless. (Ky.) *Thomas v. Green Co.*, 159 F. 339, 89 C. C. A. 405, judgm't affm'd, *Green Co. v. Thomas's Ex'r*, 211 U. S. 590, 53 L. ed. 343.

- (g) *Defect of parties interested in subject matter is not ground for reversal.*

The fact that all the parties properly interested in the subject matter were not before the court, is not ground for reversing a decree dismissing the bill, where plaintiff has shown no right to relief. *Mitchell v. Chancellor*, 14 W. Va. 22.

- (h) *Objection for non-joinder of proper parties.*

An objection for non-joinder of proper parties in a bill in equity can not be raised in an appellate court, where a final decree can be rendered which will not affect the interests of the parties not joined. *Clayton v. Henley*, 32 Grattan (Va.) 65.



(i) *Refusal of the court to substitute parties plaintiff.*

Ejectment by A, B and others claiming as heirs in right of their deceased father. In the course of the litigation a motion was made to substitute A and B as sole plaintiffs, on the ground of their having acquired the interests of the other heirs after suit. The motion was made under the Act of April 26, 1850, providing for the substitution of purchasers by assignments after action brought of the title of the plaintiff in ejectment, and that the suit should not be affected thereby. The court refused the motion and after trial verdict was given for the defendant, administrator, that A and B were not entitled by virtue of the fractional interest possessed by them at the beginning of the suit, and that the refusal of the motion was ultimately to their advantage, as it resulted in a verdict and judgment affecting them only in said fractional interest, instead of in the whole interest in suit, as would have been the case had the substitution been allowed. On error assigning the refusal to substitute; held, that though the refusal was error, the supreme court would not reverse. *Alden v. Grove*, 18 Pa. 377.

(j) *Misjoinder of parties did not affect any substantial right of the party objecting.*

Under Statutes 1893, sec. 4028 (Wilson's Revised and Annotated Statutes 1893, sec. 4344), requiring the court to disregard the defects in pleading which do not affect the substantial rights of the adverse party, an error in joining a party as plaintiff in an action will not be regarded by the supreme court on appeal, where no objection to the misjoinder of parties was raised at the trial below, and where such error can not and does not affect the substantial rights of the adverse party. *Brook v. Bayless*, 6 Okl. 568, 52 P. 738; *Degnan v. Nowlin*, 5 Ind. Ter. 312, 82 S. W. 758.

(k) *Misjoinder of unnecessary parties plaintiff.*

Where the real party in interest was the plaintiff in the action, and the record showed the real cause of action, so that a recovery therein would be an effectual bar to another action by the proper party in interest, defendant suffered no substantial injury by reason of the misjoinder of unnecessary parties plaintiff, especially as the matter could be rectified on appeal by striking out the names of the unnecessary parties. *Matney v. Gregg Bros. Grain Co.*, 19 Mo. App. 107.

(l) *Misjoinder of parties defendant not ground for reversal.*

A petition stated in one count a cause of action to quiet title and in another a cause of ejectment. Defendants were the tenants in possession and the landlord. The landlord answered to the merits and sought to defend the tenant's possession. Held, that the misjoinder of defendants, because the landlord was not a proper or necessary party to ejectment, was not ground for reversal of the judgment granting plaintiff relief in both causes. *Mann v. Doerr*, 222 Mo. 1, 121 S. W. 86.

(m) *Failure to make lessee of abutting property a party defendant.*

A judgment against a city, in an action by a pedestrian for injuries caused by a defective sidewalk, will not be reversed for plaintiff's failure to make the lessee of the abutting property a party defendant, as required by Revised Statutes 1899, sec. 5723, where the case shows that the lessee is not individually liable. *George v. City of St. Joseph*, 97 Mo. App. 56, 71 S. W. 110.

(n) *Failing to make third person a party.*

Where, in the trial of a cause, an objection to the mis-

joinder of a person was made, and the court granted leave to the opposite party to bring in such third person, but the cause was tried without making him a party, and he was not, in fact, a proper party, there was no reversible error. *Stoner v. West Jersey Ice Mfg. Co.*, 65 N. J. L. 20, 46 A. 696.

(o) *Deducting his lien cures error in denying to make subcontractor a party.*

Where, in defense to an action on a building contract, defendant sets up the filing of a lien for an amount due from the plaintiff to a subcontractor, defendant is not prejudiced by the action of the court in refusing to allow such subcontractor to be brought in, where the amount of the lien is deducted from the judgment awarded plaintiff. *Barnwell v. Kempton*, 22 Kan. 314.

(p) *Allowing a stranger to be made a party to the action.*

An appellant is not entitled to have a judgment against him reversed because the trial court allows a stranger to the action to be made a party thereto, where no prejudice results therefrom. *Clapp v. Trowbridge*, 74 Iowa 550.

(q) *In suit to sell land to satisfy legacy to complainant, failure to make personal representatives of the devisees parties.*

A decree for complainant, in a suit to have land sold to satisfy a legacy to complainant, which was a charge upon it, should not be reversed because of the failure to make the personal representatives of the devisees parties, where there was no demurrer or objection below on that ground, and it is not shown that such devisees left personalty out of which the legacy could be paid, even if it would be liable for its payment. *Wingfield v. McGhee* (Va. Sup.), 72 S. E. 154.

- (r) *Entry of second judgment correcting name of a party defendant.*

A judgment having been entered on a verdict against defendants C. and S. C. S., it was determined that J. P. S. was the real party defendant described as S. C. S., and the party that had in fact defended, whereupon a second judgment was rendered on the same verdict against C. and J. P. S. Held, that such second judgment was not prejudicial to C. *Lee v. Conrad* (Iowa Sup.), 117 N. W. 1096.

- (s) *In an action against several for assault and battery, the one held liable can not complain of the discharge of his co-defendants.*

If a defendant, in an action against several for an assault and battery, is liable, he is not prejudiced because the verdict is against him only, and in favor of his co-defendants, where no issues were raised by the pleadings as to the rights of the defendants among themselves. *Jones v. Parker*, 81 S. C. 214, 62 S. E. 261.

Sec. 29. Partnerships.

- (a) *Refusal to require plaintiffs to show whether they sued as a partnership or as a corporation.*

Where plaintiffs sued as individuals, and the evidence showed transactions as Y. & Co., any error in refusing a charge requiring them to state whether they constituted a partnership or a corporation, and to state in what capacity they sued, was harmless, where the evidence showed that plaintiffs composed the firm. *Edmonson v. Lovan Carriage & Harness Co.* (Mo. App.), 130 S. W. 64.

- (b) *Answer of one of the firm as to cause of insolvency.*

A merchant who had sold goods to a firm just before its failure claimed to have relied on the assurance of a partner that their assets exceeded their liabilities. It was shown that

when the vendor's agent had asked one of the firm how he reconciled these assurances with the failure, the latter said something about having lost a good deal of money in a series of years in failures. Held, that even if the answer may not have been material, its admission was harmless. *Shipman v. Seymour*, 40 Mich. 274.

(c) *Rejection of evidence offered to disprove partnership.*

Where a case was tried upon the theory that the answer and affidavit of defendant were sufficient to put plaintiff upon proof of a partnership, and plaintiff is permitted to introduce evidence tending to maintain that issue, the rejection of evidence offered by defendant to disprove such issue is harmless error. *Richards v. McNeme*, 87 Mo. App. 396.

(d) *Refusal to require production of partnership books in evidence.*

For alleged errors of the lower court which "do not affect the merits of the judgment, decision or decree" complained of, this court will not reverse, and therefore the refusal by the chancellor of a motion to compel the production of partnership books in evidence, if it be assumed to be technical error, is immaterial, when this court can see that nothing which could possibly be shown from the books would change the decision. *Pearce v. Pettit*, 85 Tenn. 724, 4 S. W. 526.

(e) *Admission of declaration of alleged co-partner before a prima facie case is established.*

Admission of declaration of alleged co-partner in aid of prima facie proof of the partnership before, instead of after such prima facie case is made, is harmless. *Judgm't 89 Ill. App. 544 affm'd, Daugherty v. Heckard*, 189 Ill. 239, 59 N. E. 569.

(f) *Refusal to permit corporate defendant to prove alleged partnership out of which it grew.*

The refusal, based upon the state of the pleadings, to

permit a corporate defendant to prove facts tending to show that the partnership out of which it grew was the real party in interest, does not affect "substantial rights" within the meaning of Wilson's Revised and Annotated Statutes, Okl. 1903, chap. 56, art. 8, sec. 146, covering the reversal of judgment, where no testimony on that point was offered after the pleadings were amended, and the incorporation was evidently merely for business convenience, the parties taking nearly all the stock in their own names, and was followed by no change in the manner of doing business. (Okl.) Judgm't 87 P. 320, 17 Okl. 350 affm'd, McCabe & Steen Const. Co. v. Wilson, 209 U. S. 275, 52 L. ed. 788.

(g) *Refusal of question to prove that indebtedness of partnership exceeded value of assets.*

In replevin of property levied on as the individual property of A, where the property is claimed by plaintiff as the partnership property of A & B, and the jury find that it belonged to A, a question of the right of the creditors of A to levy on the partnership of A & B becomes unimportant, and the refusal to admit testimony to prove that the indebtedness of the partnership exceeded the assets is not prejudicial to the plaintiff. Young v. Roberts, 17 Neb. 426, 22 N. W. 792.

(h) *Improper evidence of debts of firm paid by retiring partner.*

The firm of M & T bought out M & M and agreed to pay the debts of the latter firm as a part of the consideration of the purchase price, and subsequently one of the partners in the purchaser firm sold out his interest there to the firm of T & B, the latter firm agreeing to pay all debts of the firm of M & T. The firm of T & B did not keep their agreement, and the partner who sold out his interest to them was obliged to pay the debt himself. Held, that the error, if any, in admitting in evidence, in an action by

the retiring partner to recover from the firm of T & B the amount so paid, the notice of the dissolution of the partnership of M & T which recited all the accounts against it would be settled by T was not prejudicial to the defendants, where they were permitted to give evidence to the effect that the dissolution in itself referred merely to the accounts of the firm of M & T in their course of business. *Moffett v. Turner*, 23 Mo. App. 194.

(i) *Misdirection as to tests of partnership.*

Where there was some evidence of the existence of a partnership at the date of the policy by which the alleged partners were insured, and the defendants did not except to the charge of the judge by which the jury were instructed to accept the tests of partnership; held, that a judgment on a verdict finding the alleged partnership to have existed, should not be reversed on appeal merely because some of the tests of partnership laid down by the judge were doubtful. *Kimball v. Insurance Co.*, 21 Super. Ct. (8 Bosw. N. Y.) 495.

(j) *In action to charge silent partner, submission to jury of written agreement to disprove such relation*

In an action to charge one as a silent partner, the submission to the jury for their construction, of written agreements which defendants contended disproved the partnership relation, is error of which plaintiff can not complain, where it appears that the effect of the agreements was to dissolve a formerly existing partnership. *Currier v. Robinson's Est.*, 61 Vt. 196, 18 A. 147.

(k) *Instruction that unless express notice of dissolution was given firm remained liable.*

In assumpsit on a partnership contract to pay toll for a line of coaches owned by strangers, defendants contended that there had been a dissolution of the firm, and that plain-

tiffs knew that the contract was not binding. The court, on the question of liability submitted the issue of the dissolution and notice thereof, but erroneously stated that the contract would stand good notwithstanding, unless there was an express notice given to the firm that they would no longer be security for the toll. The jury found that plaintiffs had no notice at all of the dissolution. Held, that the misdirection to the jury was not ground for a new trial, since without prejudice. *Princeton & K. Turnpike Co. v. Gulick*, 16 N. J. L. (1 Har.) 161.

(1) *Where jury found land partnership property, instruction as to individual ownership was immaterial.*

The giving of an instruction to the effect that if the land was owned in fee by the partner in whose name title was taken, and he sold same to his co-partner, who took and retained possession, the latter's grantee might have his title quieted against the partner who had title, is harmless error, where the jury found that the land was partnership property. *Dickey v. Shirk*, 128 Ind. 278, 27 N. E. 733.

Sec. 30. Pendency of another action.

(a) *Complaint of pendency of another action between the same parties, where same had been dismissed.*

A party plaintiff can not complain of refusal to dismiss the action on account of pendency of a prior suit between the same parties, for the same cause of action, if it appears that such first suit would have been ineffective, and had actually been dismissed in pursuance of a stipulation of the parties prior to the trial of the second suit. *Dyer v. Scalmanini*, 69 Cal. 637, 11 P. 327.

Sec. 31. Permission to file pleadings.

(a) *Permission to defendant to file a cross-complaint after issues are made up.*

Permission to defendant to file a cross-complaint after

issues are made up, is not reversible error, where the result would have been the same without it. *Ross v. Wellman*, 102 Cal. 1, 36 P. 402.

- (b) *Error in allowing supplemental complaint to be filed, where record shows nothing was done under it.*

Error in permitting a supplemental complaint to be filed is harmless, where the record does not show that it was served or answered, or that damages claimed under it were allowed. *McLennan v. Ohmen*, 75 Cal. 563, 17 P. 687.

Sec. 32. Refusal of pleadings.

- (a) *Refusal to allow plaintiff to file supplemental complaint.*

The refusal of the trial court to allow the plaintiff to file a supplemental complaint setting up that since the commencement of his action, the cause thereof accrued, will not be disturbed on appeal, where the refusal worked no other hardship than delay and costs. *Smith v. Smith*, 22 Kan. 699.

- (b) *Refusal of leave to file special plea, where defendant had equal benefit under the general issue.*

A refusal to permit the filing of a special plea is not ground of error, where the defendant had the benefit of all evidence which could have been introduced under it, under the general issue. *Insurance Co. v. Stocks*, 40 Ill. App. 64; *affm'd*, 148 Ill. 76.

- (c) *Refusal of proper plea, where another averring the same facts was negated by the verdict.*

It is not ground for reversing a judgment that a proper plea was refused, where a plea in the case averring the same facts was negated by the verdict. *Fleming v. Toler*, 7 Grattan (Va.) 310.

Sec. 33. Reply or replication.

- (a) *Permitting the filing of additional paragraph of reply, where defendant's proof not interfered with.*

Error in permitting an additional paragraph of a reply to be filed is harmless, where evidence of all defendant's allegations is admissible under the general denial already pleaded. *Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 803.

- (b) *Irregularity in filing plea, for replication to an answer, will not reverse a decree.*

In an equity suit defendant, with his answer, filed a bond. Plaintiff filed no replication, but pleaded non est factum and a bond. Evidence was heard and a decision given against the bond. Held that, while it was irregular to file a plea to an answer, the proper course being for plaintiff to have filed a general replication, accompanied by an affidavit, putting in issue the execution of the bond under the plea, being sworn to, could be treated as an affidavit, and, as issue was joined upon it and testimony, and no injustice had been done by the irregular proceeding, the decree would not be reversed. *Simmons v. Simmons's Adm'r*, 33 Grattan (Va.) 451.

- (c) *Where no reply was filed to answer setting up new matter and on hearing judgment was for plaintiff, filing of reply was waived.*

If a reply was necessary but not filed, a judgment for plaintiff on the facts must imply that the issues were tried on evidence as if reply had been waived. *Moorman v. Fox*, 7 O. N. P. 45, 9 O. D. n. p. 638.

- (d) *Erroneously striking replication where plaintiff has no cause of action.*

The striking of a replication from the record, though erroneous is of no avail on error to a plaintiff who shows no cause of action. *Moffet v. Brown*, 16 Ill. 91.

Sec. 34. Set-off.

- (a) *Unverified plea of set-off ignored where judgment is right on the merits.*

The defects in a plea of set-off, arising from the fact that it was not sworn to, is not ground for a reversal of the judgment where, upon a review of the whole record, the judgment appears to be substantially right. *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. 457.

- (b) *When set-off allowed by jury, instruction excluding was harmless.*

Where it appears from the amount of the verdict that the jury allowed defendant a set-off pleaded by him, he can not assign as error an instruction excluding such set-off from their consideration. *Copeland v. Koontz*, 125 Ind. 126, 25 N. E. 174.

- (c) *Instruction to deduct amount of set-off, not pleaded, not ground for complaint.*

A defendant against whom judgment has been rendered can not complain because the court instructed the jury to deduct from the damages recoverable by the plaintiff the amount of a set-off not pleaded by defendant. *Butler v. Greene*, 49 Neb. 280, 68 N. W. 496.

- (d) *Charge that a plea of set-off confesses the debt sued on, but plaintiff ought not to have judgment because he owes defendant a debt, etc.*

In an action for breach of contract, where defendant set-off plaintiff's alleged breach of another contract, and defendant's evidence showed that there was no material difference between the parties as to the work done under the contract sued on, thus proving plaintiff's demand, the giving of a charge that a plea of set-off confesses the debt sued on, but says that plaintiff ought not to have judgment

therefor, because he owes defendant a debt which defendant elects to set-off against the claim in suit, was not reversible error. *Theo. Powell & Co. v. Fox-Hays Const. Co.* (Ala. Sup.), 48 S. 785.

Sec. 35. Similiter.

(a) *The mere absence of a similiter is immaterial.*

After a full trial upon the merits and verdict upon the matters embraced in the declaration and pleas, the mere absence of a similiter to the plea or replication is not ground of arrest of judgment or reversal, the similiter not having been insisted on by the opposing party or required by the court. *Huling v. Bank*, 19 Fla. 695.

Sec. 36. Statute of Limitations.

(a) *Where answer pleads the 5, 15 and 20-year statutes of limitation, sustaining demurrer to last two where right remains to 5-year statute.*

Where an answer in separate paragraphs pleads respectively the 5, 15 and 20-year statutes of limitation, it is not reversible error to sustain demurrers to the two latter paragraphs, where the defendant has the right to make his defense under the five-year statute. *Fisher v. Bush*, 133 Ind. 315, 32 N. E. 924.

(b) *Statute of limitations pleaded and sustained cures error in excluding evidence.*

Where the general statute of limitations was interposed and sustained as a defense to an action, error in excluding evidence which did not relate to any part payment within the period of limitations, nor to any written promise within such period, was harmless and not prejudicial, since it could not possibly have changed the result. *Schlueter v. Albert*, 39 Mo. App. 154.

(c) *Refusal to permit defendant to add plea of statute of limitations.*

Action by administrators of the father's estate against a son for money advanced by the father. The account book of the father containing the charge was admitted in evidence, in connection with recent declaration of the son that he had paid a specified sum on account. After the testimony was closed defendant offered to add the plea of the statute of limitations. The offer was rejected by the court, who charged that, on the evidence of the book and that relating to the admissions, the jury should make their findings. After verdict and judgment for plaintiff, defendant took error, assigning the refusal to permit the additional plea. Held, that the real basis of the action was the defendant's admissions, the book entry being inducement to these admissions, defendant was not harmed by its admission; it was therefore not assignable for error. *Schmoyer v. Schmoyer*, 17 Pa. 520.

(d) *Erroneous ruling on statute of limitation or equitable rights was immaterial.*

In trespass to try title. If defendant proves his legal title he need not invoke the aid of the statute of limitations or equitable rights in the land; hence, erroneous rulings on these points will be disregarded as wholly immaterial on appeal by plaintiff. *Bohanan v. Hans*, 26 Tex. 445.

(e) *Erroneous overruling of statute of limitations was without prejudice.*

Where the defendant claims the right to go to the jury on a question of fact, after his plea of the statute of limitations has been improperly overruled, and there is a peremptory charge to find for the plaintiff for a less amount than he claims, to which plaintiff excepts and brings error, the

judgment entered on the verdict must be affirmed, as no error was committed to plaintiff's prejudice. *Cleary v. Ellis Foundry Co.*, 132 U. S. 612.

- (f) *Striking out plea of statute of limitations where, in action of ejectment, available under the plea of not guilty.*

In ejectment, the defense of limitations being available under the plea of not guilty, striking out such defense is harmless. *Wilson v. Williams*, 52 Miss. 487.

- (g) *Where action properly determined against the plaintiff on the issue of former adjudication, plaintiff was not prejudiced by an erroneous ruling on an answer pleading statute of limitations.*

Where an action was properly determined against the plaintiff on the issue of former adjudication, plaintiff was not prejudiced by an erroneous ruling on an answer pleading the statute of limitations. *City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342.

- (i) *Instruction submitting the issue of limitations, though evidence insufficient to sustain a finding on that issue.*

Where, in trespass to try title, in which defendants claimed through the transfer of a certificate from the patentee, as well as by limitations, the evidence conclusively showed such transfer that a contrary finding would have been set aside, error in submitting the issue of limitations, though the evidence was palpably insufficient to sustain a finding for defendants on that issue, could not have misled the jury to find for them on that issue so as to be reversible. *Allen v. Clearman* (Tex. Civ. App.), 128 S. W. 1140.

Sec. 37. Striking from pleadings.

- (a) *Error in striking out parts of pleading, where remainder was sufficient to cover things sought to be proved.*

Error in striking out parts of pleadings is not prejudicial, where the remainder is sufficient to cover the things sought to be proved thereunder. Supreme Council C. K. of America v. Fidelity & Casualty Co. (Tenn.), 63 F. 48, 11 C. C. A. 96; R. Co. v. Wilson, 138 Ala. 510, 35 S. 561; Coffee v. Williams, 103 Cal. 550, 37 P. 504; City of Lowasco v. Brinkmayer, 12 Ind. 349; Darnell v. Salee, 7 Ind. App. 581, 34 N. E. 1020; Guenther v. Taylor, 23 Ky. L. R. 536, 63 S. W. 439; White v. R. Co., 19 Mo. App. 400; Berk v. Heisthardt, 55 Neb. 232, 75 N. W. 582; Zorn v. Livesley, 44 Ore. 501, 75 P. 1057; Penter v. Staight, 1 Wash. St. 365, 25 P. 469; Slateman v. Mack, 61 Wis. 575, 21 N. W. 527.

- (b) *Where second plea alleged all averments stricken out of first and more, no injury shown by striking out the first.*

A second plea alleged all the averments of the first plea and more; the first plea was stricken out and trial had on the second. Held, in the absence of a bill of exceptions showing that defendant was deprived of any advantages under the plea upon which trial was had, that he would have had if the first had been permitted to stand, no injury was shown by striking out the plea, though it might not have been the proper way to reach it. Parkhurst v. Stone, 36 Fla. 456.

- (c) *Striking out matter from answer cured by permitting all to be gone into at the trial.*

Where the court strikes out matters from the answer, which are largely argumentative and are allegations and

representations of fact already put in issue by the petition and general denial, but on the three trials the matters contained in those allegations had been gone into, the error in striking out such matter is harmless. *Thomas v. Concordia Cannery Co.*, 68 Mo. App. 350.

(d) *Striking out general denial cured by trial as though in.*

Where, in proceedings to enforce a mechanic's lien, the answer of defendants was a general denial, the striking out of such answer was not prejudicial to defendants, where the cause was fairly tried on the issues as if the answers originally filed had been in. *O'Brien v. Hanson*, 9 Mo. App. 545.

(e) *Defendant can not complain of having plea struck when he has another to the same effect.*

The defendant is not prejudiced by the striking out of his plea of part payment, when he has in the record a plea of full payment of the bonds sued on. *Prewett v. Vaughn*, 21 Ark. 417.

(f) *Defendant not injured can not object to striking out the name of another defendant.*

A defendant can not object on appeal to the striking out of the name of another defendant, unless it appears that he was injured thereby, whatever may be the ground on which it was done. *Dawson v. Wilson*, 79 Ind. 485.

(g) *Error in striking out answer when evidence was heard as fully as though rejected answer had remained.*

The only material difference between the answer to a cross-complaint and an answer which was stricken out, was that the latter stated that by reason of defendant's alleged facts, plaintiff was damaged in a specified sum, no part of which was paid, satisfied, or discharged in any way, and the former merely prayed that plaintiff be allowed to recoup against defendant any damages sustained as alleged.

Both otherwise contained a full statement of the facts out of which the alleged damages arose, and evidence thereof was allowed as fully as if the rejected answer had remained on file. Held, that plaintiff could not complain of the court's refusal to permit his answer to stand exactly as he desired. *Taylor v. Ford*, 131 Cal. 440, 63 P. 770.

(h) *The striking out of a reply as not responsive to a question too trivial to warrant a reversal.*

Where, in an action for injuries, witness has testified to a partial dislocation of plaintiff's shoulder, and that the injury was permanent, and on cross-examination, in response to the question, "Is an injury of this character capable of being remedied so that the man's shoulder can be replaced in the same condition as it was before the injury?" he answered, "Oh, yes, we reduce dislocation of the shoulder joints." The striking out of such reply as not responsive to the question is not of such importance as to warrant a reversal. *Baker v. Barello*, 136 Cal. 160, 68 P. 591.

(i) *Error in striking out part of reply cured by introducing the forbidden matters in evidence.*

Error in striking out part of a reply is cured by the introduction in evidence, without objection, of the matters forbidden to be set up in the reply. *Water Supply Co. v. Tenney*, 24 Col. 344, 51 P. 505.

(j) *Striking paragraph from complaint, when provable under other paragraphs.*

Any error in striking a paragraph from a complaint is harmless where the matter provable thereunder was provable under other paragraphs. *Schnull v. Cuddy*, 36 Ind. App. 262, 74 N. E. 1030; *Gaving v. Fitzgerald*, 105 Iowa 507, 75 N. W. 358.

- (k) *Expunging allegations as to purchasing automobile from defendant.*

In an action for the loss of the use of an automobile damaged through defendant's negligence, error in expunging allegations as to purchase of automobile from defendant, held harmless, testimony on that point having been offered and received. *Cook v. Packard Motor Car Co.* (Conn. Sup.), 92 A. 413.

Sec. 38. Surplusage in pleadings.

- (a) *Surplusage in pleadings does not vitiate after verdict.*

Surplusage in pleadings does not in any case vitiate after the verdict. *Carroll v. Peake*, 1 Peters (U. S. Supreme) 18, 7 L. ed. 35.

Sec. 39. Tender.

- (a) *Defendant not prejudiced by failure of plaintiff to plead a tender.*

The petition in an action for the price paid for a heating plant in a building contained no allegation of an offer to return the property. Evidence that the plant had been safely stored, and that defendant was at liberty to remove it was given without objection, and defendant admitted that when plaintiff asked him, shortly before the plant was removed from the building what he intended to do with it, he replied that he would have nothing more to do with it, and stated that he would not have taken the plant had it been offered back to him. Held, that defendant was not prejudiced by the failure to plead tender, for the evidence showed that it would have been of no avail, and that the plant was at his disposal. *Olson v. Brison*, 129 Iowa 604, 106 N. W. 14.

(b) *Error in instruction as to tender, in action for the sale of a patent right.*

An error in the instructions given, in an action founded on an alleged fraud in making a sale of a patent right, relative to the necessity of making a tender thereof of all the patent right back to defendant is harmless. *Hess v. Young*, 59 Ind. 379.

CHAPTER III.

INTERLOCUTORY ORDERS OF THE COURT.

- Sec. 40. Change of venue.
41. Consolidation of actions.
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Sec. 40. Change of venue.

- (a) *Denial of change of venue not an abuse of discretion.*

Change of venue is within the discretion of the court, and its rulings will not be disturbed unless it clearly appears that there was an abuse of that discretion. *Stephens v. Bradley*, 24 Fla. 201.

Sec. 41. Consolidation of actions.

- (a) *Where two actions were consolidated, and judgment on one for plaintiff, immaterial that the other did not state a cause of action.*

Where two actions between the same parties were consolidated and judgment rendered for plaintiff in one action, it is immaterial, on an appeal by defendant, that the complaint in the other action did not state facts constituting a cause of action. *Adams v. De Boom* (Cal. Sup.), 39 P. 858.

- (b) *Consolidation of cases adjudicated on pleadings in answer to interpleader was harmless error.*

Where defendants filed an answer setting up the fact that they had been garnisheed by other parties claiming adversely to plaintiff, and prayed that these be made parties to the suit, and that the respective rights to the fund be determined, and the matter was adjudicated on pleadings in answer to the interpleader, the consolidation of the cases was harmless error. *Blackman v. Houssels* (Tex. Civ. App.), 35 S. W. 511.

- (c) *The only insurance company defending not injured by consolidating actions against different companies.*

The insured, having brought a separate action against each of several insurance companies in which his property was insured, the only one of the companies which made any defense was not prejudiced by the action of the court in consolidating the several actions, as there was no issue of fact, the only issue made being one of law. *Insurance Co. v. Crozier*, 12 K. L. R. (abst.) 143.

- (d) *Refusal to order consolidation where no prejudice shown.*

A judgment will not be reversed for refusal of the court to consolidate the action in which it was rendered with another merely because such a consolidation might have been proper; but to procure a reversal the party aggrieved must show his rights substantially prejudiced thereby. *Harder v. R. Co.* (Kan. Sup.), 87 P. 719.

Sec. 42. Continuances.

- (a) *Refusal of continuance on setting up a new cause of action.*

The refusal of a continuance, on the ground of setting

up a new cause of action, in an action for divorce and to quiet title to plaintiff's alleged half-interest in land conveyed by defendant, plaintiff's alleged husband, by a supplemental petition praying in the alternative, that if the court held that she was not lawfully married to her alleged husband, as averred in her original petition, then that the land in question was acquired by the joint efforts of herself and him, while living together as husband and wife, in the honest belief that they were legally married, and that their relations to each other and said property constituted them equal partners as to the property, and praying that a half-interest therein be set apart to her, was not prejudicial, where the court based its judgment upon the fact found that there was a marriage, and wholly disregarded any kind of partnership. *Harlan v. Harlan* (Tex. Civ. App.), 125 S. W. 950.

(b) *Refusal of continuance where no harm resulted therefrom.*

Defendant's affidavit for a continuance, stating what his testimony would be, alleged that he was unable to attend the trial on account of sickness, that he was an important witness in his own behalf, and that his presence was necessary to a proper defense thereof. Plaintiff admitted that defendant would testify as stated in his affidavit, and consented that the same might be used as evidence upon the trial. The continuance was refused. Held, that this action of the court would not be reversed unless affirmatively shown to have been injurious. *Pate v. Tint*, 72 Ind. 450; *Chamberlain v. Loewenthal*, 138 Cal. 47, 70 P. 932; *Supreme Lodge K. P. v. Lipscomb*, 50 Fla. 406, 39 S. 637; *Markson v. Ida*, 29 Kan. 700; *College v. Linscott*, 30 Kan. 240, 1 P. 81; *Insurance Co. v. Altschales*, 55 Neb. 342, 75 N. W. 862; *R. Co. v. Dacres*, 1 Wash. 195, 23 P. 415.

(c) *Refusing continuance for an absent witness.*

Any error in refusing defendant a continuance for an absent witness is harmless, defendant having submitted its case solely on a question of pleading, and the burden of proof resting on plaintiff's evidence, and interposing a challenge thereto, and having, on appeal, demanded judgment on the pleadings and plaintiff's evidence. *Port Blakely Mill Co. v. Insurance Co.* (Wash. Sup.), 97 P. 781; *Ruffinach v. Ruffinach*, 13 Col. App. 102, 56 P. 812; *Gruddies v. Bliss*, 86 Ill. 132; *McKinsey v. McKee*, 109 Ind. 209, 9 N. E. 771; *Rowley v. Rowley*, 19 La. 557; *People v. Fire Com'rs*, 87 Hun 620, 34 N. Y. Supp. 356; *R. Co. v. Shott*, 92 Va. 34, 22 S. E. 811.

(d) *Denial of continuance for exhaustion of counsel.*

A continuance on the ground of the unavoidable physical and mental exhaustion of defendant's attorneys was properly refused, where it subsequently appeared that they were able to attend court and interpose a skilful defense, without apparent injury to their health. *Crabtree Coal Mining Co. v. Sample's Admr.*, 24 Ky. L. R. 1703, 72 S. W. 24; *Peachey v. Witter*, 131 Cal. 316, 63 P. 468; *Va. Iron, Coal & Coke Co. v. Kiser*, 105 Va. 695, 54 S. E. 889.

(e) *Refusal to postpone trial to consider an improper demurrer presented in the form of a replication.*

Putting into a replication an objection that certain defenses in the answer did not constitute facts sufficient to constitute any defense, did not make that instrument a demurrer, and a refusal by the trial court to postpone the trial until the issues of law were disposed of was not erroneous. In any event it was immaterial error, since the same objection might be raised at the trial without demurrer or pleading the same. *Byers v. Fritch*, 12 Col. App. 377, 55 P. 622.

(f) *Denying continuance to a corporation for prevailing public passion.*

No prejudice could have resulted to the defendant, a corporation, in an action for injuries resulting in death, by the denial of a continuance on account of public passion, where the verdict was for only \$1,500. *Crabtree Coal Mining Co. v. Sample's Admr.*, 24 Ky. L. R. 1703, 72 S. W. 24.

(g) *Refusal of continuance and permitting reply to be filed.*

Revised Statutes 1909 permits defendant to demur to a reply within three days after filing. Sec. 1810 provides that, if the answer contains new matter and plaintiff fails to reply or demur thereto within the time prescribed by order or rule of court, plaintiff may have such judgment as he is entitled to on the new matter. Sec. 1811 provides that the case shall be at issue upon the filing of the reply, and sec. 1814 authorizes the court to strike a frivolous demurrer from the files. Sec. 2082 forbids a reversal, except for error materially affecting the merits. The answer in a case filed some time prior to the date set for hearing contained new matter, and no reply was made thereto, and, on the case being called for trial defendant moved to continue, because the case was not at issue, and because defendant had the right to demur to plaintiff's reply within three days after the reply was filed. The court denied the motion, and permitted the reply, which was a general denial of the new matter in the answer to be filed instanter. Held, that the action of the court was not prejudicial error, as defendant had waived his objection that the case was not at issue by failing to move for judgment on the pleadings, and the case was at issue on the filing of the reply instanter, and a demurrer to the reply, consisting only of

a general denial, would have been frivolous. *Podgeon v. R. Co.*, 154 Mo. App. 20, 133 S. W. 130.

(h) *Error in granting continuance harmless unless fair trial thereby prevented.*

Unless a fair trial was thereby prevented, a judgment will not be reversed for error in granting a continuance. *Ball v. State*, 18 Ind. 362; *Shurtz v. Woolsey*, 18 Ind. 435; *Harm v. Wilson*, 28 Ind. 296; *Pate v. Tint*, 72 Ind. 450; *Hall v. Woodson*, 13 Mo. 462.

(i) *Court in refusing continuance stating that case had been specially set and counsel had stated he would be ready.*

At the opening of the trial of a case set for trial, counsel for defendant informed the court that he was engaged in another trial in another court and requested a continuance. The court refused the request and stated that the case had been specially set, that counsel had, on separate occasions, stated that he would be there and try the case. Held, that the language of the court was not prejudicial to defendant as leading the jury to believe that counsel had quit in bad faith. *McFern v. Gardner*, 121 Mo. App. 1, 97 S. W. 972.

(j) *Where prepared to meet issue as to market value of animals, refusal of continuance for evidence as to intrinsic value.*

While the term "market value" is not synonymous with "intrinsic value," the one meaning the actual price at which the commodity is commonly sold, and the other its true inherent and essential value, independently of accident, place or person. but is the same everywhere and to everyone, yet the latter is so generally a factor which enters into the determination of the value that it may be

said that a thing which has no intrinsic value is generally without market value, and therefore, where a party was prepared to meet an issue as to market value of animals damaged in transit, the refusal of a continuance to procure evidence as to their intrinsic value presented by a trial amendment was not prejudicial. *R. Co. v. Clements* (Tex. Civ. App.), 115 S. W. 664.

(k) *Refusal of continuance not ground for a new trial.*

Failure to grant a continuance is ordinarily no cause for a new trial. *Moody v. State*, 54 Ga. 660.

(l) *Denial of continuance not considered on appeal.*

Application for continuance on account of the absence of one of the parties to the suit is a matter left to the sound discretion of the trial judge, and will not be interfered with unless manifestly unjust. Another division of the civil district court of the Parish of Orleans assumed jurisdiction than the one to which the case had been allotted. No objection was made before the district court. It was not in consequence considered on appeal. *Lebonisse v. Cotton Rope Co.*, 43 La. Ann. 582.

(m) *Error in overruling motion for continuance cured by taking deposition of sick absent witness.*

Where an application for a continuance, on the ground of the sickness of an absent witness, was overruled, and the case was postponed until the deposition of the witness was taken, which was read to the jury, there being no reason to suppose that the sickness of the witness affected his testimony, it was held that the decree should not be reversed on that ground. *Rogers v. Rogers*, 41 Ky. (2 B. Mon.) 324; *Matthews v. R. Co.*, 142 Mo. 645, 44 S. W. 802.

Sec. 43. Interlocutory orders.

- (a) *Erroneous order which had no prejudicial effect on the case.*

An interlocutory order which has no prejudicial effect on the final disposition of the case, even though erroneous, is not sufficient to justify a reversal of the case. *Fishel v. Goddard*, 30 Col. 147, 69 P. 607; *Col. F. & J. Co. v. Four-Mile R. Co.*, 29 Col. 90, 66 P. 902.

- (b) *Granting leave to intervene was immaterial.*

Where a garnishee defendant set up the same defense as was urged by a claimant intervenor, and the case was determined by the circuit judge on undisputed facts, the order granting leave to intervene was immaterial. *Stern v. Wing*, 135 Mich. 331, 10 D. L. N. 804, 97 N. W. 791.

Sec. 44. Jurisdiction.

- (a) *Objection to jurisdiction that there was an adequate remedy at law.*

Under the rule that an appellate court will not reverse the decisions of a trial court for error, unless the error has prejudiced the party who complains of it, or has deprived him of a substantial right, the action of a federal court in overruling an objection to its jurisdiction in equity, based on the ground of an adequate remedy at law, although erroneous, is not reversible error, where there was no issue which could have been submitted to a jury; but the case was heard and determined on the bill, answer and admissions of the defendant, involving solely questions of law, and defendant was not therefore deprived of his constitutional right to a jury trial, which was in effect waived by his admission of the facts on which complainant's right of recovery depended. *R. Co. v. U. S. (Cal.)*, 186 F. 737, 108 C. C. A. 607; *affm'g decree of 157 F. 96; judgm't modified, 228 U. S. 618.*

(b) Overruling after the trial a plea to the jurisdiction.

Where a plea to the jurisdiction was not good, that the court did not determine it until after trial on the merits was immaterial. *Patton v. Balch* (N. M. Sup.), 106 P. 388.

Sec. 45. Jury trial, refusal of.*(a) Refusal of a jury trial which inflicted no harm.*

General Statutes 1901, sec. 4713, provides that issues of fact arising in an action to recover money or specific property shall be tried by a jury, unless a jury trial is waived or a reference ordered, and sec. 4714 provides that all other issues of fact shall be tried by the court, etc. In an action to recover judgment on a note and foreclose a mortgage securing it, a defendant claimed that it had purchased the mortgaged land from the mortgagor's wife under execution and acquired a sheriff's deed thereto, and defendant mortgagor answered denying that his wife had title when the judgment was rendered upon which the execution issued, but that she held it in trust for him. Held, that the controlling question of fact as to the wife's ownership having been submitted, and defendant mortgagor having had an opportunity to present his case fully to the jury he was not materially prejudiced by the refusal of a jury trial on the issues of fact. *Haston v. Sigel-Campion Live Stock Com. Co.*, 81 Kan. 656, 106 P. 1096; *Nichols v. Bryden*, 86 Kan. 941, 122 P. 1119; *Houghton County v. Rees*, 34 Mich. 481; *Ward v. Qunlivin*, 65 Mo. 453; *W. D. Cleveland & Sons v. Smith* (Tex. Civ. App.), 113 S. W. 547; *Kruegel v. Murphy & Bolanz* (Tex. Civ. App.), 126 S. W. 680.

(b) Denial of jury trial immaterial where the court directs a verdict.

The denial of a trial by jury is immaterial, where the

evidence was such that the court was required to direct a verdict. *Combs v. Burt and Brabb Lumber Co.*, 27 Ky. L. R. 439, 85 S. W. 227.

Sec. 46. Medical examination.

- (a) *Refusal to order medical examination, where had without an order.*

The refusal of an order of court requiring a party to submit to a medical examination is not ground of error where an examination is had without an order, the error, if any, is harmless. *R. Co. v. Holland*, 122 Ill. 461.

- (b) *Where injuries were subjective rather than objective, defendant not prejudiced by refusal to allow examination of plaintiff's person.*

Where, in an action for injuries, plaintiff having testified that on examination there were no objective signs of injury on his body and no bruises, and that injuries were subjective rather than objective, and defendant's physician had thoroughly examined plaintiff, and fully detailed his condition, as a witness, defendant was not prejudiced by the court's refusal to compel plaintiff to submit to an examination of his person at the trial. *Sambuck v. R. Co.*, 138 Cal. xix, 71 P. 174.

Sec. 47. Moot question.

- (a) *Moot question unaffecting substantial rights.*

It is not the duty of a court to answer moot questions, and when, pending proceedings in error in this court, an event occurs without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the petition in error. *Miner v. Witt*, 82 O. S. 237.

Sec. 48. Motions.

- (a) *Refusal of motion to require plaintiff to separate and docket as separate cases his causes of action.*

A complaint was in two paragraphs. The first alleged indebtedness to plaintiff for one year's work on a farm and for board furnished defendant's employees. The second alleged that defendant hired plaintiff to work on his farm for one year, and before the expiration thereof unlawfully ejected him therefrom and refused to permit him to continue to work. Held, that overruling a motion that plaintiff be required to separate the causes of action and docket them as separate actions was not reversible error. *Fulton v. Heffelfinger*, 23 Ind. App. 104, 54 N. E. 1079.

- (b) *Motion to strike answer partly incompetent properly overruled.*

Where a witness is asked a question, which is proper and competent, and the answer of the witness to it is partly incompetent and partly competent, and a motion is made to strike out the answer it is not error to refuse to sustain such motion. *Circleville v. Sohn*, 20 O. C. C. 368, 11 O. C. D. 193; *R. Co. v. Godwin*, 12 O. C. D. 613; *R. Co. v. Garsuch*, 8 O. C. C. n. s. 297, 18 O. C. D. 468, *affm'd w. o.* 76 O. S. 609; *Curtis v. Buckley*, 14 Kas. 449.

- (c) *Overruling motion to strike certain portions of answers as not responsive to questions.*

The overruling of a motion to strike from the record certain portions of the answers of a witness as unresponsive to the question, where it appears that the matter thus sought to be eliminated is not calculated to mislead the jury or harmful to the rights of the moving party, held not prejudicial error. *Peaks v. Lord*, 42 Neb. 15, 60 N. W. 349.

(d) *Refusal of motion to amend complaint where case tried as fully as though it had been granted.*

In an action on a note the plaintiff moved to amend his complaint by alleging that the note was given in payment of the balance of an open mutual account, "in order to conform with the proof." The motion was denied, but the cause was tried as fully as if it had been granted. Held, that the refusal to grant the motion was harmless error. *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407.

(e) *Motion for judgment on the pleadings properly sustained.*

Although an answer was not irrelevant, if it was insufficient and disclosed no reason why the plaintiff should not have the judgment prayed for, an error of the court in striking out the answer was immaterial, since the motion for judgment on the pleadings was properly sustained, whether the answer be stricken out or considered as a pleading in the case. *Steinhauer v. Colmar*, 11 Col. App. 494, 55 P. 291.

(f) *Denial of defective motion to require separate statement and numbering of causes of action.*

Refusal to sustain a defective motion to require separate statement and numbering of causes of action held not an abuse of discretion. *Traction Co. v. Walsh* (Ind. App.), 108 N. E. 19.

(g) *Denying motion to require election cured by eliminating all but one cause of action.*

Error in denying a motion to compel the plaintiff to elect between causes of action is cured by instructions eliminating all but one cause. *Mohrenstecher v. Westervelt*, 87 F. 157, 30 C. C. A. 584; *Tuffree v. Binford*, 130 Iowa 532, 107 N. W. 425.

- (h) *Overruling motion to elect, where three counts constitute but one cause of action.*

Where a petition which, in fact, contains but one cause of action, with proper prayer for relief, is divided into three counts, the first of which states a cause of action, and the other two do not, but which, if taken in connection with the first count, might have enlarged the cause of action stated in the first count, and these three counts are headed respectively, as follows: first cause of action, second cause of action, third cause of action, and the defendant moves the court to compel the plaintiff to elect upon which cause of action he will proceed, and also demurs to the petition on the ground "that there are not facts sufficient, stated in either of said counts, to constitute a cause of action," and the court overrules both said motion and said demurrer, and afterward a judgment is rendered in accordance with the prayer of the petition, and just such a judgment as would be proper if the words, "first cause of action," "second cause of action," "third cause of action," were stricken out of said petition; held, that although the district court may have erred in disregarding said words, still the error is not of such a substantial character as will require a reversal of the judgment by the supreme court. *Andrews v. Alcorn*, 13 Kan. 351.

- (i) *Employing motion to strike, when demurrer the proper method.*

Where a motion to strike out an amended complaint, as not stating a cause of action, was treated by the trial court as a demurrer, and the issue raised by it was tried in the way it would have been if it was a demurrer, and no prejudice is shown, error can not be predicated thereon, though a demurrer would have been the proper

method of testing the complaint. Seal v. Cameron, 24 Wash. 62, 63 P. 1103.

(j) *Overruling motion to make definite and certain immaterial.*

Where the petition contains unnecessary allegations and phrases, which are treated in the trial of the case as surplusage, where there is no claim that the defendant is misled thereby, where no evidence is admitted to sustain them, where no instructions are based thereon, where they are not considered by the jury, and furnish no basis for judgment; held, that no prejudicial error was committed in overruling a motion to make more definite and certain. Rouse v. Downs, 5 Kan. App. 549, 47 P. 982.

(k) *Denial of motion to make petition definite cured by evidence.*

In an action for breach of a contract to furnish a retail dealer with fertilizers, where plaintiff sought to recover for loss of profits on sales which he made, but had been unable to fulfill, the denial of a motion to make the petition more specific, by giving the names of the persons to whom sales were made was not prejudicial error, the dates of the sales and the names of the purchasers being given in evidence on the trial. Currie Fertilizer Co. v. Krish, 24 Ky. L. R. 2471, 74 S. W. 268; Trayser Piano Co. v. Kirschner, 73 Ind. 183; Alleman v. Wheeler, 101 Ind. 141.

(l) *Overruling motion to strike out portions of petition.*

It was not error to overrule a motion to strike out portions of a petition where, by reason of such ruling, it does not appear that the moving party was prejudiced. Insurance Co. v. Berg, 44 Neb. 522, 62 N. W. 862.

(m) *Overruling motion to reform an answer.*

In an action by M against B, the petition alleged that defendant sold and indorsed a promissory note past due, secured by a mortgage on land and chattels; that upon suit to collect said note the makers answered pleading that, except as to an insignificant portion of the consideration, the note was given for usurious interest in which complainant lost the amount thereof, etc. The defendant answered that, at the time of the sale and indorsement of the note by him to plaintiff, he informed plaintiff of each and every defect therein, etc. The plaintiff moved for an order requiring defendant to make his answer more specific, that he state in what manner he informed the plaintiff of the defects in said note, and of the defense thereto, and for a further order requiring him to separate his second paragraph and show what portion thereof is relied upon for a defense and what portion is intended as affirmative relief, set-off or counterclaim against the plaintiff, which motion was overruled. Held, not reversible error. *McDuffee v. Bentley*, 27 Neb. 380, 43 N. W. 123.

(n) *Overruling motion to strike evidentiary facts from a reply.*

It is not reversible error to overrule a motion to strike from the reply evidentiary facts which, if submitted to the jury, would tend to establish the ultimate facts alleged in the petition. *Hudelson v. Bank*, 56 Neb. 247, 76 N. W. 570.

(o) *Denial of motion to strike names of certain defendants and all references to them from complaint.*

Pending an action against several defendants, one of whom, who had not been served with summons, died, and no personal representative was appointed. As to another defendant, the action was discontinued by order to that

effect. Plaintiff thereafter moved to strike from the summons and complaint the names of these defendants, and all allegations relating exclusively to them. Held that, as such allegations in no manner tended to exonerate the other defendants from liability, plaintiff was not injured by the denial of the motion. *Sleeman v. Hotchkiss*, 60 Hun 577, 14 N. Y. Supp. 78.

(p) *Overruling motion to consolidate cases not prejudicial.*

A husband and wife severally owned tracts of land that were used as one property, but not as a homestead. A railroad company condemned a right of way across both tracts. Each separately appealed from the award of damages. A motion by the land-owners in the district court to consolidate the cases was overruled. Held, that there was no presumption that the ruling was prejudicial to the substantial rights of the parties. *Hardel v. R. Co.*, 74 Kan. 615.

(q) *Motion to quash summons for disinterested defendant not available to the other defendants.*

Where certain defendants who were duly served claimed that one of their number was the exclusive owner of the property in controversy and that another defendant was not interested in the property, error in failing to quash the summons served on the latter defendant, on her motion, is harmless as to the former defendants. *Taylor v. Davis*, 47 Ind. App. 557, 75 N. E. 3.

(r) *Error in overruling motion to quash service of summons.*

A summons issued by a justice in a civil suit was served by delivery of a copy to the defendant by a private individual, as shown by his affidavit; a judgment was rendered against defendant by default. On appeal to the circuit court, he moved to quash the return on the

ground that the person so serving had not been appointed a special constable, and the court overruled the motion to quash. Defendant then made full defense before a jury, and there was judgment upon the verdict against him for \$107.85. Held, that the judgment would not be reversed for error in overruling the motion to quash. *Johnson v. MacCoy*, 32 W. Va. 552, 9 S. E. 887.

(s) *Introduction of defendant's motion to require security for costs.*

In an action by a bankruptcy trustee to set aside a preference the introduction of defendant's motion to require security for costs is not ground for reversal. *Calkins v. Bank*, 99 Mo. App. 509, 73 S. W. 1098.

(t) *Refusal to admit affidavits in support of motion to dissolve a temporary injunction.*

A refusal to admit affidavits in support of motion to dissolve a temporary injunction is harmless error, where, on final hearing, the injunction was made perpetual. *Deweese v. Hutton*, 144 Ind. 114, 43 N. E. 13.

(u) *Motion to exclude a witness's testimony, not specifying the incompetent part.*

A motion to exclude a witness's testimony, not specifying the incompetent part, may be overruled, if part is competent. *Morris v. Faurot*, 21 O. S. 155; *Westerman v. Westerman*, 25 O. S. 500; *Elstner v. Fife*, 32 O. S. 358.

(v) *Subsequent proof cured error in overruling motion to dismiss.*

If, after a motion to dismiss, made on the ground that the opening of plaintiff's counsel disclosed no cause of action, has been denied, the requisite proof is put in, the exception to the denial of the motion is of no avail. *Clemmons v. Brinn*, 36 Misc. 157, 106 St. Rep. 1066, 72

N. Y. Supp. 1066, affm'g 35 Misc. 844, 72 N. Y. Supp. 1097.

(w) *Overruling motion to strike out improper evidence where there is sufficient proper evidence therefor.*

The refusal to strike out improper evidence is harmless, where there is sufficient proper evidence in support of the same question. *Robbins v. Sackett*, 23 Kan. 301.

(x) *Improperly overruling motion to dismiss plaintiff's case cured by defendant's evidence supplying lacking proof.*

When a motion to dismiss the complaint, made at the close of plaintiff's case, on the ground of failure of proof, which should have been granted, was denied, and the defendant, in his evidence, supplies the lacking proof, the error was rendered harmless. *Horowitz v. Pakas*, 49 N. Y. Supp. 1008, 22 Misc. 520.

(y) *Denial of motion to strike statement of a witness that testator was afraid of his wife, etc.*

Where a witness testified somewhat in detail concerning her visits and conversations with the testator and his wife, and things said and done by them, denial of a motion to strike a statement of witness that testator was afraid of his wife, and "dared not reply though goaded beyond endurance by her attacks on his family," was not prejudicial. *In re Miller's Est.* (Utah Sup.), 102 P. 996; *Miller v. Livingston*, Id.

(z) *Where party gains all sought by motion to withdraw juror, denying same was harmless.*

Where a party gains all he sought by a motion to withdraw a juror, he will have no ground to complain of the refusal of the motion. *Morrison v. Hedenberg*, 138 Ill. 22.

Sec. 49. Objections overruled.

- (a) *Overruling motion where action brought against treasurer on two bonds for defalcation for two funds, held liable on one.*

A county treasurer gave an official bond and a special one as treasurer of the school fund. The same parties were sureties on both bonds, and the former would cover a defalcation in the school fund. The action was brought on both bonds, the petition showing defalcation, but not showing what part thereof was of the school fund. An exception on said ground was overruled. There was no defalcation of the school fund shown, and the judgment did not in terms fix liability on the second bond. Defendants did not claim that they were misled by the petition. The first bond was sufficient to cover the defalcation. Held, that the error, if any, in overruling the exception was harmless. *Anderson v. Walker* (Tex. Civ. App.), 49 S. W. 937; modified, 23 Tex. 119, 53 S. W. 821.

Sec. 50. Receivers.

- (a) *Error in failing to give notice of application for a receiver.*

Where the circumstances are such that notice should have been given of the application for the appointment of a receiver; but as on motion to vacate the order, a full hearing was had on the merits, the original error is without prejudice. *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399.

- (b) *Second order corrected erroneous one appointing a receiver.*

An erroneous order appointing a receiver is not cause for reversal if followed by a second and proper order, and no harm is shown to have resulted. *Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976.

(c) *Error in joining receiver cured by judgment against railroad.*

In an action against a railroad company and its receiver for personal injuries which occurred while the company was operating the road, error, if any, in joining the receivers as defendants, is cured by a judgment against the company alone. *R. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839.

(d) *Forcing to trial embarrassed corporation in the hands of a receiver.*

Forcing to trial a consolidated case arising from contentions against a corporation in the hands of a receiver, without allowing the corporation time to plead allowed by equity rules, is not reversible error, where the appointment of the receiver was with the assent of the corporation and steps taken to bring the case to a speedy trial were acquiesced in by all the parties. *Valdes v. Central Altagracia* (Porto Rico), 225 U. S. 58, 56 L. ed. 980.

Sec. 51. Refusal to docket.

(a) *Refusal to docket cross-complaint as a separate suit.*

The refusal to docket a cross-complaint as a separate suit is not such error as will require a reversal, for whether there was one trial or the trials were separate could not be prejudicial if the final result reached was right. *Thiebaud v. Tait*, 138 Ind. 238, 36 N. E. 525.

Sec. 52. Revivorship.

(a) *Debtor reviving judgment in the name of the personal representative of deceased judgment creditor.*

Though a judgment debtor has no right under sec. 3577 of the Code of 1887 to revive a judgment in the name of the personal representative of a deceased judgment creditor, for the purpose of obtaining an appeal, such a

course is harmless error. *City of Charlottesville v. Stratton's Admr.*, 102 Va. 95, 45 S. E. 737.

- (b) *Revivor in the name of the administrator, instead of the heirs, to establish a trust in land.*

Error in reviving an action to establish a trust in land in the name of the administrator of a deceased defendant, instead of in the name of the heirs, was harmless, where the heirs were all parties to the action. *Mayers v. Lark* (Ark. Sup.), 168 S. W. 1093.

- (c) *Erroneously continuing cause after revivorship in the name of decedent.*

Before the trial, in an action in replevin against the sheriff the plaintiff died, and the cause was revived in the name of the executrix. An answer to the executrix's petition was filed by the sheriff, but the name of the original action was used in it, instead of that of the executrix. Sufficient appeared in said answer to show to what petition it applied, and it was, in fact, filed in the proper cause. No motion was made and filed to strike it from the files. Held, error without prejudice. *Williams v. Eikenbary*, 36 Neb. 478, 54 N. W. 852.

Sec. 53. Rulings of the court.

- (a) *Rulings based on the sound discretion of the court may be reviewed, and may be reversed when it appears that from a mistaken opinion of its power it erred.*

The judgment of the court below based upon a ruling as to matter resting in its sound discretion may be reviewed, and reversed when it appears that from a mistaken opinion of its power in the premises it failed to exercise discretion. *Steves v. Carson*, 21 Col. 280, 40 P. 569.

(b) *Rulings which, right or wrong, could have no effect upon the final result.*

An assignment of error as to rulings which, whether right or wrong, could have had no effect upon the final result, will not be considered. *Denver Hardware Co. v. Croke*, 4 Col. App. 530, 36 P. 624.

(c) *Rulings, where appellant could not recover in any event.*

Where the record shows that appellant could not recover in any event, erroneous rulings can not cause reversal of the judgment against him. *McPhail v. Buell*, 87 Cal. 116, 25 P. 266.

(d) *Ruling of chancellor refusing injunction.*

Where it does not clearly appear that a chancellor's ruling refusing a temporary injunction was against the weight of the evidence, such ruling can not be held to be erroneous. *Blumenthal v. Mohlmann*, 49 Fla. 275.

(e) *Erroneous rulings not followed by the jury in their verdict.*

Erroneous rulings in regard to matters which were material on the trial conflicting upon the theory of the case, not accepted by the jury in their verdict, will be held error without prejudice. *McIntyre v. Eastman*, 76 Iowa 455.

(f) *Wrong reasons for correct ruling immaterial.*

A correct ruling of the trial court will not be disturbed because of erroneous or wrong reasons which may have been given therefor, as it is with the ruling itself, and not with the reasons therefor, with which the appellate court is concerned. *Hoopes v. Crane*, 56 Fla. 395; *Murrell v. Petersen*, 57 Fla. 480; *McCord v. Knowlton*, 76 Minn. 391, 79 N. W. 397.

- (g) *Refusal to rule that defendant could be liable both as owner and keeper of a vicious dog.*

Under a declaration in two counts, one alleging defendant to be the owner of a dog that inflicted injury on plaintiff, and the other charging him with being its keeper, where the jury finds that defendant was not the owner, refusal of the court to rule that defendant could not be liable both as owner and keeper was harmless error. *O'Donnell v. Pollock*, 170 Mass. 441, 49 N. E. 745.

- (h) *Party denied right to set up erroneous ruling which was to his advantage.*

Where the evidence was conflicting as to whether the contract sued on was for the amount alleged in the complaint or for a lesser amount, and the verdict was for the lesser amount, defendant could not object to the verdict on the ground that the only verdict that could be established by the evidence was for a greater amount, since the verdict for the lesser amount was to defendant's advantage. *Sutro v. Eastern E. & Co.*, 130 Cal. 329, 62 P. 558; *McClung v. Moore*, 138 Cal. 181, 71 P. 98.

- (i) *Ruling denying application to amend answer.*

After plaintiff had amended his complaint defendant moved for leave to amend his answer by making a special traverse of each of the material allegations in the complaint, but the motion was denied. Held that, on appeal it was not necessary to inquire whether the court was correct in ruling that the original answer sufficiently states the defense of defendant. It appeared that afterwards, but after all the amendments to the complaint had been made, defendant filed an amended answer in which he had an opportunity to deny and did deny the material averments of the complaint as amended. *Frey v. Vignier*, 145 Cal. 251, 78 P. 733.

- (j) *If party desires ruling upon demurrer reviewed he must not plead over.*

If a party desires to have the ruling by the court below upon a demurrer reversed he must not plead over, but take his appeal from the final judgment perfected upon the demurrer. *Mayo & Stokes v. Keyser's Ex'x*, 17 Fla. 744.

- (k) *Ruling on plea immaterial where defense allowed under the general issue.*

In assumpsit on a bill of exchange, where defendant pleaded the general issue, and also specially that there was a failure or want of consideration, a ruling against the validity of such special plea affords no ground of complaint, the facts showing a want or failure of consideration being admissible under the general issue. *Hankins v. Shoup*, 2 Ind. 342.

- (l) *Ruling on reply to insufficient answer immaterial.*

It is immaterial whether a reply to an insufficient answer is held good or bad, as the ruling of the court thereon can not be made available error in any event or for any purpose. *Insurance Co. v. Baker*, 71 Ind. 102.

- (m) *Refusing permission to file affirmative answer, when matters proposed were given in evidence and embraced in the verdict.*

There was nothing injurious to defendant in the court's refusal to permit it, after the issues had been closed, to file an affirmative answer, where the record shows that the matters set forth in the answer proposed to be filed were given in evidence and embraced in the verdict. *R. Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564.

- (n) *Refusal to allow separation of complaint into paragraphs must prejudice some substantial right to reverse a judgment.*

Refusal of a motion to separate a complaint into paragraphs, if erroneous, is not ground for reversal, unless it appears that the appellant has been deprived of some substantial right. *R. Co. v. Beck*, 152 Ind. 421, 53 N. E. 439; *Everitt v. Bassler*, 25 Ind. App. 303, 57 N. E. 560.

- (o) *Refusal to allow defendant to file a second demurrer.*

Defendant was allowed to withdraw a demurrer to a complaint in aid of a foreign judgment. He then filed a plea and offered to file a general demurrer to a certain allegation. The demurrer, had it been filed, must have been overruled, the allegation being substantially good; held, that error, if any, in refusing to allow the second demurrer, was without prejudice, and hence no ground for reversal. *Jackson v. Baxter*, 1 Ind. 42, Smith, 15.

- (p) *Erroneous ruling that burden was on interpleading claimant to show ownership of attached goods.*

On the trial of an issue arising in an attachment suit on an interpleader of a party claiming the subject under a conveyance from defendant attacked said conveyance as fraudulent, and the court ruled, before the testimony began, that the burden was on the interpleading claimant to show a prima facie ownership of the goods. Held, that such ruling was erroneous and harmless, the jury having received no instruction upon the point. *Meyberg v. Jacobs*, 40 Mo. App. 128.

- (q) *Errors in rulings on pleadings immaterial where all the merits of the controversy are determinable under facts found by the court.*

Where the merits of a controversy involving fraudu-

lent representations can be determined under the facts found by the court, any error in ruling on pleadings, merely deficient in direct averment that the false representations were relied on, is harmless. *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619.

(r) *Where demurrer to plea is sustained and defendant files substantially the same plea, and issues are joined, the ruling on the demurrer not considered.*

Where a demurrer to a plea is sustained, and defendant files substantially the same plea, but makes it more explicit, and issue is joined, the ruling on demurrer will not be considered. *Clary v. Isom*, 56 Fla. 236, 47 S. 919.

(s) *Ruling that only a portion of deposition could be put in evidence.*

Error, if any, in a ruling that plaintiff could put in evidence a portion of a deposition, without introduction of the remainder, was harmless, where the whole deposition was read in evidence. *F. W. Niebling Co. v. James Coal & Ice Co.* (Utah Sup.), 137 P. 834.

(t) *Rulings upon qualification of expert witnesses not reviewable where there is proof to sustain them.*

Rulings on the qualifications of expert witnesses are not reviewable, if there is some fair proof to sustain them. *R. Co. v. Newbold*, 151 N. Y. Supp. 732.

(u) *Correct ruling without evidence whereon to base it.*

Where a charge lays down a correct rule applicable to the case, but there is no evidence on which to base it, it is harmless. *City of Los Angeles v. Pomeroy*, 124 Cal. 597, 57 P. 585.

- (v) *Slight errors, irregularities and inaccuracies in rulings in the progress of a trial, cured by later rulings or evidence, not seriously regarded by a reviewing court.*

Irregularities, inaccuracies in rulings, and slight errors of judgment occurring in the progress of a trial, which have been cured by later rulings, or have no controlling influence on the main issue, would not be seriously regarded by a reviewing court. *State v. Dickerson*, 77 O. S. 34.

- (w) *Erroneous rulings which worked no injury.*

A judgment will not be reversed on account of rulings of the court below which were not correct, if those rulings have worked no injury to the losing party, and could not have changed the result. *Persse v. Cole*, 1 Cal. 369; *Priest v. Union Canal Co.*, 6 Cal. 170; *Young v. Emerson*, 18 Cal. 416; *Norwood v. Kanfield*, 30 Cal. 393; *Henry v. Everts*, 30 Cal. 425; *Zunwalt v. Dickey*, 92 Cal. 156, 28 P. 212; *Warren v. R. Co. (Cal.)* 67 P. 1; *Smith v. Smith*, 168 Ill. 488; *Rockford City Ry. Co. v. Blake*, 173 Ill. 354; *Mays v. Deaver*, 1 Iowa 216; *Mitchell v. Harcourt*, 62 Iowa 349.

- (x) *Ruling on testimony immaterial, where verdict could not have been otherwise.*

Alleged errors in the rulings admitting testimony will not be considered where, in any view that may be taken of the case, a verdict should have been directed for defendant in error. *Hollister v. Brown*, 19 Mich. 163; *Heenan v. Forest City Paint & Varnish Co.*, 138 Mich. 548, 101 N. W. 806, 11 D. L. N. 661; *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358.

- (y) *Where unimportant where lottery tickets were purchased court's ruling was harmless.*

Where it was unimportant where the purchase of lot-

tery tickets was held to have occurred, the trial court's ruling with reference thereto, even if subject to criticism, being harmless, was not ground for reversal. *Roselle v. Beckemeier*, 134 Mo. 380, 35 S. W. 1132.

(s) *Erroneous ruling immaterial, when no material evidence is received under it.*

An erroneous ruling as to the admission of evidence becomes immaterial and constitutes no cause for reversal, when no material evidence is offered or admitted under the ruling. *Knights of Pythias v. Allen*, 104 Tenn. 623, 68 S. W. 241; *Collins v. Shenoan*, 67 Wis. 441, 30 N. W. 730.

(a-1) *Erroneous ruling on evidence cured by directed verdict.*

Rulings on the admission of evidence, though erroneous, are not prejudicial, and are immaterial to be considered on appeal, where the court subsequently and properly directed a verdict because of matters not controlled or affected by such evidence. *Chapman v. Yellow Poplar Lumber Co.* (Va.), 89 F. 903, 32 C. C. A. 402.

(b-1) *Erroneous rule employed in ascertaining amount due.*

In an action by a mortgagee, seeking to redeem a title, where the holder of such title was allowed as much as she was entitled to under the statute providing therefor, the fact that no rule was adopted in ascertaining the amount is not ground for reversal. *Harms v. Hughs*, 52 N. J. Eq. 288, 29 A. 681.

(c-1) *Ruling in action for assault that provocation would bar recovery of exemplary damages was not prejudicial to defendant.*

A ruling, in an action for assault and battery, that if

there was reasonable excuse for the defendant, arising from the fault and provocation of plaintiff, but not sufficient to justify the act done by defendant, no recovery could be had of exemplary damages, or of anything but nominal damages, is not one of which the defendant can complain. *Dresser v. Blair*, 28 Mich. 501.

(d-1) *Erroneous ruling on evidence which did not injure appellant.*

Erroneous rulings upon evidence which appeared from the record not to have materially injured appellant, was not ground for appeal. *Hudson v. Hudson*, 129 Cal. 141, 61 P. 773; *People v. Wynn*, 133 Cal. 72, 65 P. 126.

(e-1) *When questions are presented on special findings and conclusions of law, rulings on demurrers are immaterial.*

Where the questions are presented on special findings and conclusions of law that arise on demurrer to plea, the rulings on the demurrers will be regarded as immaterial. *Stephenson v. Boody*, 139 Ind. 60, 38 N. E. 331.

CHAPTER IV.

JURY, WITNESSES, ISSUES, BURDEN OF PROOF.

- Sec. 54. Burden of proof.
55. Issues.
56. Jury, impaneling, examining, swearing, etc.
57. do questions arising during the trial.
58. Right to open and close to the jury.
59. The witnesses.

Sec. 54. Burden of proof.

(a) *Harmless error upon the burden of proof.*

Where the jury finds specially upon all the evidence introduced upon the trial, that the railroad company failed "to exercise such care and caution that a man of ordinary prudence would have exercised under similar circumstances in not burning off the right of way," and such finding is supported by evidence, it is immaterial whether the burden of proof of such fact was upon the plaintiff or the defendant. *R. Co. v. McBride*, 54 Kan. 172, 37 P. 978; *Badger M. & M. Co. v. Ellis*, 76 Kan. 795, 92 P. 1114.

(b) *Shifting decision upon the burden of proof.*

Where defendant, upon whom was the burden of proof, was given the concluding argument to the jury, he can not complain that the court first ruled that the burden was on plaintiffs, and required them to first introduce their evidence. *Stem v. Whitney*, 23 Ky. L. R. 2179, 66 S. W. 820.

(c) *Instruction placing on one suing for personal injury the burden of showing he had not assumed the risk.*

A charge which erroneously places on one suing for

personal injury the burden of showing that he had not assumed the risk is not prejudicial to defendant. *R. Co. v. Tracy* (Tex. Civ. App.), 130 S. W. 639.

(d) *Where the burden of proof is transferred to defendant, although the whole issue is set-off, but plaintiff assumed the burden of proof, the error will not be regarded.*

Although the burden of proof is transferred to defendant, where the sole plea is set-off, yet, where it appears on appeal that the trial proceeded as though the general issue had been filed and the plaintiff assumed the whole burden of proof, the error will not be regarded. *U. S. v. West*, 8 App. (D. C.) 59.

(e) *Improperly placing the burden of proof upon the defendant.*

Where the court, in an action by a buyer of wheat for breach of the contract, improperly held that the burden of proof was upon the defendant, thus giving him the closing argument, and it appeared that the buyer had in no way been damaged by the breach of the contract, and had no right to recover, the action of the court was at most harmless error. *Acme Mills & Elevator Co. v. Johnson*, 141 Ky. 718, 133 S. W. 784.

(f) *Charge erroneously placing on defendant the burden of proving plaintiff's fraud in the purchase of a note.*

Where there is absolutely no evidence of plaintiff's mala fides in purchasing the note in suit, or knowledge of the fraud in its inception, a charge placing on defendant the burden of proving plaintiff's fraud is harmless error. *Rice v. Rankans*, 101 Mich. 378, 59 N. W. 660.

(g) *Instruction placing the burden of proof, not pleaded, on the defendant to establish contributory negligence.*

The question of contributory negligence not being

raised by the pleadings, or being raised on evidence offered thereon, the issue is as upon the general denial, but having elected to prove that contributory negligence caused the injury complained of, although unnecessary, the defendant was not prejudiced by a charge putting the burden of proof upon it and to establish the contributory negligence. *Interurban Co. v. Haines*, 31 Ohio Cir. Ct. R. 265.

(h) *Instruction that burden of proving contributory negligence was on defendant.*

In the absence of evidence that the negligence of plaintiff's intestate contributed to his injury, an instruction that the burden of proving contributory negligence was on defendant, although erroneous, was harmless. *Fitzsimmons v. Isman*, 151 N. Y. Supp. 552.

(i) *Charge that burden of proof lay on defendants to show want of consideration.*

Plaintiff charged C with embezzlement, and C gave his note, indorsed by W. Held, the onus rested on W to show that the defalcation was less than the amount agreed upon, and the defendants, having failed to show how much less it was, the instruction that the execution of the note being admitted, the burden of proof was upon the defendants to show want of consideration is harmless error. *Beath v. Chapoton*, 124 Mich. 508, 83 N. W. 281, 7 D. L. N. 307.

(j) *Court inadvertently saying that burden of proof was on plaintiff, when defendant was meant.*

An exception does not lie to a statement of the presiding judge, in his charge to the jury, that the burden of proof is on the plaintiff, when he intended to say, on the defendant, if the mistake was so obvious that no one

concerned in the trial could be misled by it. *Deyan v. Thomas*, 79 Me. 221, 9 A. 354.

(k) *Erroneously charging that burden of proving plaintiff "committed the crime" was on defendant.*

Where, in an action against a fire insurance company for the amount of a loss, the defense was that insured had burned the property, but the evidence showed that insured had made great exertions to save the property, the error in instructing that the burden of proving that plaintiff "committed the crime" was on the company was immaterial, the verdict being for plaintiff. *Insurance Company v. Cargett*, 42 Mich. 289, 3 N. W. 954.

(l) *Party claiming error to be harmless has the burden of showing it to be so.*

A party who claims that an error is harmless has the burden of showing it to be so. *Gregory v. Arons* (Ind. App.), 96 N. E. 196.

(m) *Party introducing incompetent evidence has the burden of showing that no prejudice resulted.*

A party introducing incompetent evidence has the burden of showing that no prejudice resulted. *R. Co. v. Steed* (Ark. Sup.), 151 S. W. 257.

(n) *Improperly placing the burden of proof.*

In an action for money collected by defendant as attorney, in which he counterclaimed for services rendered, error in placing the burden upon defendant to prove his employment, as well as the amount and value of his services, his employment being admitted by the reply, was not prejudicial to defendant, where the jury found for him on his counterclaim. *Youngerman v. Pugh* (Iowa Sup.), 125 N. W. 321; *Meybery v. Jacobs*, 40 Mo. App. 128.

- (o) *A charge that the burden is on plaintiff to establish the facts essential to his cause by a preponderance of the evidence, objection to the word "establish."*

The word "establish" in a charge that the burden is on plaintiff to establish the facts essential to his cause of action by a preponderance, or greater weight, of evidence, renders the charge too strong against the plaintiff, and the defendant can not complain. *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179.

- (p) *In action on valued insurance policy, refusal to instruct that the burden of proof was on plaintiff to show that the fire was not by his own criminal act.*

In an action on a valued policy of insurance, any error in refusing to instruct that the burden of proof was on plaintiff to show that the fire was not caused by his own criminal act, was without prejudice where the evidence conclusively established plaintiff's innocence of the charge. *Morganstern v. Insurance Co.* (Neb. Sup.), 131 N. W. 969.

- (q) *Where reversal is sought for erroneous instruction the burden of proving same immaterial rests upon party favored thereby.*

Where the judge appears to have charged erroneously and reversal of judgment is sought therefor, the burden of proving that the erroneous charge was immaterial is upon the party in whose favor it was done. *People v. Ybarra*, 17 Cal. 166.

- (r) *Refusal of correct instructions upon the questions of damages and the burden of proof.*

The refusal of a correct instruction which bears upon the questions of damages and the burden of proof with respect thereto, judgment will not be reversed, if the ver-

dict rendered was not excessive. *Craw v. R. Co.*, 159 Ill. App. 100.

(s) *Refusal to charge that burden is on plaintiff to show by a preponderance of the evidence the nature and extent of her injuries.*

Error in refusing to charge that the preponderance of proof is on the plaintiff to show, by a fair preponderance of evidence, the nature and extent of her injuries, should not work a reversal where plaintiff was required to and assumed to prove her damages, and the jury were instructed that she could only recover for such as she did prove. *Hamilton v. R. Co.*, 17 Mont. 349, 42 P. 860.

(t) *Refusing request to charge on the burden of proof.*

Although the trial court might properly have instructed the jury as to the burden of proof; yet, where the defendant at the trial took upon himself the burden, no harm can be perceived to have resulted from the action of the court in refusing the request to so instruct. *Hayward v. Guilford*, 69 Mo. App. 1.

(u) *Charging twice that the burden was on plaintiff to establish his case by a preponderance of the evidence.*

Under the general rule that repetition in the instructions of a principle of law is not reversible error, unless it could have influenced the jury to believe that the court entertained a particular view as to what the evidence established, it was not prejudicial error to charge twice that the burden was upon plaintiff to establish his case by a preponderance of the evidence. *Funk v. Miller* (Tex. Civ. App.), 142 S. W. 24.

Sec. 55. Issues.

(a) *Referring the jury to the declaration for the issue.*

Referring the jury to the declaration for the issue,

though not commendable, is not necessarily reversible error. *Waschow v. Kelly Coal Co.*, 245 Ill. 516, 92 N. E. 303.

(b) *Instruction erroneously referring the jury to the pleadings for the issues.*

An instruction in an action for personal injuries sustained in a railway collision that, if plaintiff, while acting as an ordinarily prudent person, under the circumstances, was injured in the manner claimed by him in his petition, defendant could not escape liability, unless defendant proved that the accident happened from causes beyond its control, though erroneous, for referring the jury to the petition for the issues, was not prejudicial, where, under the evidence of both parties, defendant was liable. *Magrane v. R. Co.*, 183 Mo. 119, 81 S. W. 1158.

(c) *Party can not take advantage of the fact that there was no issue made up upon special pleas.*

A party can not take advantage in the appellate court of the fact that there was no issue made up on special pleas, if the pleas do not present a bar to the plaintiff's action, as any issue that might have been had upon them would have been immaterial and unavailing. *Renick v. Correll*, 4 W. Va. 627.

(d) *Irregularity of joining issue on the pleadings did not affect the merits.*

A judgment will not be reversed for mere irregularities in joining issue on the pleadings which have not affected the merits at the trial. *Sullivant v. Shaw*, 2 Ky. Dec. 35 (1801).

(e) *Plea of dissolution of injunction an immaterial issue.*

If a scire facias states that the original judgment had been suspended by an injunction, and that the injunction

had been dissolved, a plea that it had been dissolved offers an immaterial issue, and improper evidence admitted on such issue is not ground for reversing the judgment. *Richardson's Admr. v. Prince George Justices*, 11 Grattan (Va.) 190.

(f) *Court improperly changing names of parties to feigned issue.*

Though the court of common pleas has no power to change the names of parties to a feigned issue sent from the register's court; if it does, and no injury ensues, judgment will not be reversed. *Dotts v. Fetzer*, 9 Pa. St. (9 Barr) 88.

Where there are two issues, and jury is sworn to try the issue, the misprision of charging the jury to try the issue is immaterial. *Baylor v. R. Co.*, 9 W. Va. 270; *Bank v. Kimberland*, 16 W. Va. 555.

(h) *Absence of issue on special plea cured by admission of the evidence under the general issue.*

Though an issue was not made up on a special plea in an action of assumpsit, if the evidence to sustain it was admissible under the general issue, which had been pleaded, a judgment on the verdict will not be reversed for such irregularity. *Douglass v. Central Land Co.*, 12 W. Va. 502.

(i) *Errors in admitting testimony on issues withdrawn.*

Any errors in admitting evidence on issues which are subsequently withdrawn are harmless. *Perry v. Cobb*, 4 Ind. T. 717, 76 S. W. 289; *Smith v. Smith*, 167 Mass. 87, 45 N. E. 52.

(j) *On issue as to time of enlistment, error admitting secondary evidence as to existence of regiment.*

Where, on an issue as to the time a person enlisted in

a certain regiment, it was undisputed that only one person of that name enlisted during the certain four-year period, error, if any, in admitting, without proper foundation, secondary evidence as to whether the regiment existed during a part of this period was harmless. In re McClelland's Estate (S. D. Sup.), 107 N. W. 681; modified on error, 111 N. W. 540.

(k) *Where the other evidence sufficed, admission of opinion evidence.*

Where the other evidence is sufficient to determine the issue, the admission of incompetent opinion evidence is harmless error. Portland Gold Mining Co. v. Flaherty (Colo.), 111 F. 312, 49 C. C. A. 361; Acme Brewing Co. v. R. Co., 115 Ga. 494, 42 S. E. 8; Baxter v. R. Co., 104 Wis. 307, 80 N. W. 644.

(l) *Admission of evidence on issues not within the pleadings.*

The admission of evidence upon an issue not within the pleadings is error, without prejudice, where the adverse party is not taken by surprise, does not ask for time for a defense to produce testimony upon the issue, but proceeds to try the issue and produces testimony thereon, the same as if the issues had been tendered by the pleadings. Palmer v. McMasters, 6 Mont. 171, 9 P. 898.

(m) *Evidence as to immaterial issue.*

A judgment will not be reversed for error in admitting testimony with respect to an immaterial issue made by the pleadings. Stumpf v. Mueller, 17 Mo. App. 283; Clavey v. Lord, 87 Cal. 421, 25 P. 493.

(n) *Where appellant not prejudiced submission of immaterial issue was harmless.*

Where appellant is not prejudiced the submission of

unnecessary and immaterial issues is not reversible error. *Conley v. Chedic*, 7 Nev. 336; *Perry v. Jackson*, 88 N. C. 103.

(o) *Evidence to prove facts not denied or put in issue.*

Unnecessary or supererogatory evidence to prove facts not denied or put in issue is not reversible error, because not prejudicial. *Reynolds v. Rogers*, 5 O. 169; *Whelan v. Kinsley*, 26 O. S. 131.

(p) *Erroneous evidence on issue not submitted to the jury.*

Error in admitting evidence upon an issue not finally submitted to the jury is without prejudice. *Trulock v. Donahue*, 85 Iowa 748.

(q) *Erroneous evidence not bearing on any of the issues.*

In an action on notes given for a machine, wherein a breach of warranty is relied upon, it is not prejudicial to defendant for a witness to state that plaintiff took an interest in the machine and tried to make it run properly, where such statement did not bear on anything in issue, either under the pleadings or the evidence which had been received. *Evenson v. Keystone Mfg. Co.*, 83 Minn. 164, 86 N. W. 8.

(r) *Instruction referring to certain issues as "some of the most important allegations on the part of the plaintiff."*

Where the court, in its instructions, refers to the issues of the case as "some of the most important allegations on the part of the plaintiff," and as "some of the most important points at issue," complainant thereof must show special injury, as the remarks would operate equally against both parties. *Von Toebel v. Stetson & Post Mill Co.*, 32 Wash. 683, 73 P. 788.

- (s) *In the trial of an issue devisavit vel non, instruction that "medical testimony" on mental incapacity is the lowest allowable.*

In the trial of an issue devisavit vel non, an instruction that "medical testimony" on mental incapacity is the lowest allowable, and not entitled to much respect when opposed to established facts, was harmless, where it appeared that the jury must have understood the reference to be "expert medical testimony." Guaranty Trust & Safe Deposit Co. v. Waller, 240 Pa. 575, 88 A. 13.

- (t) *Where the issue is trover, instruction upon conversion.*

Where there was no issue but trover, an erroneous instruction upon conversion is not ground for a new trial. Moon v. Wright (Ga. App.), 78 S. E. 141.

- (u) *Instruction submitting issue not raised as to plaintiff being a passenger.*

In an action against a railroad company for injuries to a passenger, though no issue was raised as to plaintiff's being a passenger, an instruction submitting such issue, even if calculated to cause the jury to conclude that defendant was denying everything, placed the greater burden on plaintiff and did not injure defendant. R. Co. v. Williams (Tex. Civ. App.), 136 S. W. 527.

- (v) *By eliminating issue charge cured error in refusing one based on question of assuming risk.*

Where the charges given eliminate from the case the issue, whether an employee had assumed the risk of the dangers causing the injury, plaintiff is not prejudiced by a refusal to charge propositions of law bearing on that issue. Henion v. R. Co. (N. Y.), 79 F. 903, 25 C. C. A. 223.

(w) *Failure to submit issue upon which there is no contest.*

Where there is no conflict in the evidence upon a material issue of fact in a case, the failure to submit such issue to the jury is not error. *Pasewalk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780.

(x) *Shifting of theories as to issues during the trial.*

In an action to recover the price of a threshing machine, defendant alleged that it was not delivered under a written contract, but sold under an oral contract by the local agents, who claimed to be the owners. Held, that the fact that the trial proceeded for a considerable time on the theory that one of the issues was, whether the machine was equal to the warranty, and was finished and finally submitted to the jury upon the real issue, did not prejudice plaintiff. *Geiser Mfg. Co. v. Yost* (Minn. Sup.), 95 N. W. 584.

(y) *Issue erroneous, but plaintiff enabled to put forth the full strength of his case.*

B, being in failing circumstances, confessed judgment to A, his brother-in-law. Subsequently, at the instance of B's creditors, an issue was formed between A as plaintiff and B as defendant, to try under the pleas of "non assumpsit and payment with leave, whether any, and if any, what amount was due from B to A." The proper form of issue would have been, whether the judgment was collusive, as, if fraudulent in part, it was, under the law, void in toto. The judge, however, instructed the jury, that if the amount for which the judgment was confessed, was not due A, the judgment was fraudulent as to the other creditors. The jury having found for B, A took a writ of error assigning the above instructions. Held, affirming the sentence of the instruction, and criticising the form of the issue, that as plaintiff had been

enabled therein to put forth the whole strength of his case, he could not complain. *Gates v. Johnston*, 3 Pa. 52.

(z) *Written statement by the court of the issues in the case.*

While the statement of the issues by the court, in writing, is a practice not to be commended, such a statement was not prejudicial to defendants. *R. Co. v. Dupee's Admr.*, 23 Ky. L. R. 2349, 67 S. W. 15.

(a-1) *Failure to present an issue upon which no recovery could be had.*

Where it appears from the finding of the jury that a recovery could not have been had upon an issue raised in the case, the case will not be reversed on account of the failure to present such issue. *Churchill v. Gronewig*, 81 Iowa 449.

(b-1) *Instruction on issue upon which there is no evidence.*

An instruction presenting an issue, in support of which no evidence has been introduced, is harmless error. *Scheefer v. R. Co.*, 128 Mo. 64, 30 S. W. 331.

(c-1) *Excluding evidence thereof, where jury answered issue in the affirmative, "Did defendant negligently kill plaintiff's decedent?"*

In a trial of an action against a railroad company for negligently killing a person on its track, the error of excluding evidence as to the killing was harmless, where the issue, "Did defendant negligently kill plaintiff's decedent?" was answered in the affirmative. *Stewart v. R. Co.*, 136 N. C. 385, 48 S. E. 793.

(d-1) *Failure of jury to answer a submitted special issue.*

Though a special issue has been given to the jury, a failure to answer it is not prejudicial, if the answer would

be inconsistent with the general verdict. *Pigeon v. W. P. Fuller & Co.*, 156 Cal. 691, 105 P. 976.

(e-1) *If decision based on one issue, erroneous evidence on another.*

Where a decision is based on one issue, the erroneous admission of evidence on another issue is harmless. (Ohio) *French v. French*, 133 F. 491, 66 C. C. A. 365.

(f-1) *Action fully decided on the merits, without replication and without joinder of issue.*

An action was tried on its merits, without a replication to defendant's plea, and without a joinder of issue. Judgment having been rendered in favor of plaintiff, the defendant assigned the above for error. Assignment dismissed. *Thompson v. Cross*, 16 Sergeant & R. (Pa.) 350.

(g-1) *Failing to instruct on some, finding on one issue sufficient.*

Failing to instruct on some, finding on one issue sufficient to support the verdict. *Perry v. Insurance Co.*, 137 N. C. 402.

(h-1) *Finding on general issue for plaintiff impliedly negatives special plea of defendant.*

Where there are two issues, the general issue and an issue on a special issue, and the jury find a verdict for plaintiff on the general issue, but render no verdict on the other issue, the judgment will not be reversed if the verdict on the general issue negatives the special plea of defendant on which the other issue was joined, and the jury could not have found for plaintiff had defendant established his special plea. *Brooks v. Dalrymple*, 1 Mich. 145.

(i-1) *That jury passed on issues not mentioned in the instructions will not disturb the verdict.*

Instructions of the court given at defendant's request were such as to withdraw from the jury questions which they had a right to pass upon, but the verdict rendered in favor of plaintiff showed that they did pass upon them, notwithstanding the instructions. Held, there being testimony to support the verdict it would not be disturbed, though this court might have come to a different conclusion. *Dike v. Pool*, 15 Minn. 315 (Gil.) 245.

(j-1) *That no issue had been joined will not reverse a judgment.*

When there has been a trial, the judgment will not be reversed because of the fact that no issue has been formally joined. *Naron v. Gwin*, 43 Miss. 346; *Wood v. Moore*, 14 Tenn. (6 Yerg.) 490.

Sec. 56. Jury; impaneling, examining and swearing, challenging, etc.

(a) *Harmless error in the impaneling of a jury.*

Error in the impaneling of a jury will be without prejudice, where the complaining party did not introduce sufficient evidence to entitle him to have his case submitted to the jury. *Mellerup v. Insurance Co.*, 95 Iowa 317.

(b) *Where juror drawn more than 20 days before, contrary to statute.*

It appeared from the face of a venire and officer's return, that a juror was drawn more than twenty days before the sitting of the court, contrary to statute, 1807, chap. 140, sec. 4. Held that, in the absence of anything to show that the juror had been tampered with, the verdict would not be set aside on that ground. *Amherst v. Hadley*, 18 Mass. (1 Pick.) 38.

- (c) *Refusal to strike out "answer" to a motion for venire de novo.*

An "answer" to a motion for a venire de novo should be struck out of the pleadings, as such an answer is unknown to the practice, but where neither the answer nor the court's refusal to strike it out can possibly have resulted in any harm, the judgment can not be reversed on account of such refusal to strike out. *Johnson v. Breedlove*, 104 Ind. 521, 6 N. E. 906.

- (d) *Juror related to both litigants in the eighth degree.*

The fact that a juror was a relative of both appellants and appellees in the eighth degree, where he was not aware of it when sworn, and it does not appear to have prevented a fair trial, is not ground for reversal. *Northcutt v. Juett*, 18 Ky. L. R. 327, 36 S. W. 179.

- (e) *Relationship of a juror to counsel.*

The mere fact that one of the jurors was a brother-in-law of one of the attorneys, one who took no part in the case, is not ground for reversal. *McGilvray v. Springett*, 68 Ill. App. 275.

- (f) *Refusal to allow juror to answer whether he was a client of opposing attorney.*

A litigant, for the purpose of exercising his right of peremptory challenge, should be permitted to ask a juror whether he occupies the relation of client to the opposing attorneys, but a refusal to permit a juror to answer the question is not reversible, in the absence of a showing of prejudice. *Lowe v. Webster*, 19 Ky. L. R. 1208, 43 S. W. 217.

- (g) *Rejection of juror for insufficient cause.*

Where a case has been tried by an impartial jury, the

mere rejection of a juror was insufficient cause, and is not ground for reversal. *West v. Forrest*, 22 Mo. 344; *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257; *Crocker v. Schureman*, 7 Mo. App. 358; *R. Co. v. Rouh (Ore.)*, 49 F. 696, 1 C. C. A. 416.

(h) *Error in excusing a juror for bias.*

Error, if any, in excusing a juror for bias, was not prejudicial to plaintiff, where it was not contended that the jury impaneled was not fair and impartial. (N. Y.) *Marande v. R. Co.*, 124 F. 42, 59 C. C. A. 562; writ of error dis. 197 U. S. 626.

(i) *Exclusion of juror over sixty years old.*

The exclusion of a juror because he is more than sixty years old will not be deemed prejudicial to a party, where there still remains a sufficient number of jurors on the panel to form a jury, to whom no objection is taken, and the party's peremptory challenges are not exhausted. *Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41.

(j) *Acceptable juror excused without legal reason.*

The trial court excused a juror, acceptable to defendant, without any legal reason therefor, after plaintiff had exhausted his peremptory challenges, and it did not appear that the panel of regular jurors was exhausted. Held. not to be prejudicial to defendant. *Brennan v. O'Brien*, 121 Mich. 491, 80 N. W. 249, 6 D. L. N. 519; *Bank v. Chatfield*, 121 Mich. 641, 80 N. W. 712, 6 D. L. N. 593; *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227, 11 D. L. N. 725.

(k) *Refusal to allow certain questions to jurors.*

It is not ground of error that the court refused to allow a certain question to be put to jurors, where the party did not exhaust his peremptory challenges. *Grand Lodge v. Wieting*, 68 Ill. App. 125.

- (l) *In personal injury action asking jurors whether any of them were interested, as agent or otherwise, in a casualty company.*

In a personal injury action, it was not prejudicial error for plaintiff's counsel to ask jurors whether any of them was interested, as agent or otherwise, in a certain casualty company whose policy covered the accident, where no one was excused on account of connection with that company, and defendant did not exhaust its challenges. *Norris v. Holt-Morgan Mills*, 154 N. C. 474, 70 S. E. 912.

- (m) *Irregularity in the form of oath administered to jury.*

Appellees sued the firm of P. B. Vanden & Co., of which it was claimed appellant was a member, on an account for merchandise sold and delivered. Appellant answered denying that he was a partner, and that the goods were sold and delivered to him or at his instance and request. This being the issue, the court swore the jury to try the issue joined between plaintiffs "and the defendants, P. H. Vanden & Co." Held, that the substantial rights of appellant were not prejudiced by so slight an irregularity in the form of the oath, the jury being expressly instructed that they must find for appellant, unless they believe that he was a member of the firm. *Vanden v. Thome*, 7 Ky. L. R. (abst.) 447; *Hill v. Elliott*, 16 Sergeant & Rawle (Pa.) 56.

- (n) *Swearing jury to try the issues between plaintiff and defendants, instead of "defendant."*

Swearing a jury to try the issue between the plaintiff and "defendants," when no issue had been joined except between plaintiff and one of the defendants, is a harmless blunder. *Buhl v. Trowbridge*, 42 Mich. 44, 3 N. W. 245.

- (o) *Failure to reswear jury on adding new party during the trial.*

Where, in an action brought by a married woman, without joining her husband, on a cause of action which accrued to her separate estate, the court, after the trial was commenced and the jury impaneled, directed the husband to become a party plaintiff, the failure to reswear the jury after the addition of the new party was not ground for reversal, especially where defendant did not demand that the jury be resworn. *Merrill v. City of St. Louis*, 83 Mo. 244, 83 Am. Rep. 576.

- (p) *Denial of challenge to the array.*

In the absence of positive injury being shown, it is not error to deny the challenge to an array. *Torpedo Top Co. v. Insurance Co.*, 162 Ill. App. 338.

- (q) *Overruling challenge to juror for favor.*

The overruling of a challenge to a juror for favor because of the intimate acquaintance with one of the beneficiaries for whom plaintiff sued as trustee; held, harmless, where such personal interest in the case was only disclosed after the jury had been sworn and the remaining members of the panel excused, by a re-examination permitted to defendant's counsel who, without excuse shown, was not present when the jury was impaneled. (N. Y.) *Crucible Steel Co. of America v. Moen*, 167 F. 956, 93 C. C. A. 356.

- (r) *Error as to jurors inapplicable unless party has exhausted his peremptory challenges.*

Where certain questions are propounded to the jury and objections thereto sustained, the supreme court will not determine whether such ruling was error, unless the record shows that such jurors were retained to try the cause, and the party propounding the question exhausted

its peremptory challenges. *American Surety Co. v. Scott & Co.*, 18 Okl. 264, 90 P. 7.

(s) *Limiting the number of peremptory challenges.*

Limiting the number of peremptory challenges to three for both defendants, if error, is harmless, where it does not appear that the defendant below was not permitted to exercise all three challenges, and that some juror remained on the panel whom he wished to exclude therefrom. *Tuttle v. Farmers Handy Wagon Co.* (Minn. Sup.), 144 N. W. 938.

(t) *Objection that plaintiff was allowed six instead of three peremptory challenges.*

The objection that plaintiff on the trial of two consolidated cases was allowed six instead of three peremptory challenges, is not available to the defendant, who used but two of the three peremptory challenges to defendant, under Revised Statutes, United States, sec. 819 (U. S. Comp. St. 1901, p. 629); it stands in no position to complain that it was deprived of the right to challenge others, 107 F. 834, 46 C. C. A. 668, reversed. (Kan.), *Insurance Co. v. Hillmon*, 188 U. S. 208, 47 L. ed. 446.

(u) *Error in allowing each joint defendant special peremptory challenges.*

The error in allowing each joint defendant peremptory challenges as a separate party is harmless, where it does not appear that plaintiff accepted any juror as to whom he would have exercised a peremptory challenge had it been restricted to their proper number, and no prejudice appears. *Lane v. Fenn*, 120 N. Y. Supp. 237, 65 Misc. Rep. 336; *Freiberg v. R. Co.*, 221 Ill. 508, 77 N. E. 920.

(v) *Overruling challenge for cause to be available must be after exhaustion of peremptory challenges.*

The overruling of a challenge for cause is not ground

for reversal, unless it is shown that the objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. *Prewitt v. Lambert*, 19 Col. 7, 34 P. 684; *R. Co. v. Tracey*, 19 Col. 331, 35 P. 537; *Bank v. Schufelt*, 5 Ind. Ter. 27, 82 S. W. 927; *R. Co. v. Bacon*, 5 Kan. App. 880, 47 P. 553; *R. Co. v. Moosman*, 82 Ill. App. 172; *Sullings v. Shakespeare*, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; *Pool v. Insurance Co.*, 94 Wis. 447, 69 N. W. 65.

(w) *In the absence of injury therefrom error in sustaining a challenge to a juror is harmless.*

Sustaining a challenge to a juror for incompetency is not ground for reversal, unless it be shown that the appellants were injured thereby. *Coryell v. Stone*, 62 Ind. 307.

(x) *Sustaining challenge for cause on insufficient ground after party had exhausted its challenges.*

The sustaining of a challenge for cause on insufficient grounds is not ground for a reversal, although the adverse party exhausted its challenges and talesmen had to be taken to fill up the jury, where it is not contended that the adverse party would have challenged the talesmen, or that either of them was an unfair juror, or that it was in any way prejudiced. *R. Co. v. Manns* (Tex. Civ. App.), 84 S. W. 254.

Sec. 57. Jury; questions arising during the trial.

(a) *Submitting pleadings to jury, where issues are fully stated in the instructions.*

Where the issues are fully stated in the instructions, the submission to the jury of the pleadings, under Revised Acts, sec. 6749, authorizing the jury on retiring to

take with them papers, was not prejudicial. *Frederick v. Hale* (Mont. Sup.), 112 P. 70.

- (b) *Where the conflicts in testimony are of such a character as to involve questions of credibility, the best tribunal to decide how far a man's interest controls him is a jury of the vicinage.*

Where the conflicts in testimony are of such a character as to involve questions of credibility, this court will not assume to perform this exclusive function of a jury. Under the modern system where parties are permitted to testify, the best tribunal to determine how far a man's interest controls him is a jury of the vicinage. An appellate tribunal is least of all fitted for such a function. *Coker v. Hayes*, 16 Fla. 368.

- (c) *Jury seeing exhibits before they were identified.*

Counsel have the right to bring their exhibits into the court room, in order to have them available to introduce at the trial, and though it may be well enough to exclude them until the witness is put upon the stand to make the necessary identification; where this was afterwards done, no harm could result from the fact that they were seen by the jury before they were identified. *Connor v. R. Co.*, 149 Mo. App. 675, 129 S. W. 777.

- (d) *Attention of the jury directed to the nationality of defeated party as that of a Hebrew.*

The fact that the jury's attention is directed to the nationality of the defeated party as being that of a Hebrew, will not result in reversal. *Hoxie v. Pfaelzer*, 167 Ill. App. 79.

- (e) *Tools taken to jury room contrary to direction of the court.*

Where certain tools were introduced in evidence and

repeatedly exhibited to the jury on the trial of an action for the personal injury of a servant, largely as bearing on the issue of contributory negligence raised by defendant, the fact that such tools were taken to the jury room and were examined by the jury while considering their verdict, even contrary to the direction of the court, will not vitiate a verdict for plaintiff, when it does not appear that such action was in any way prejudicial to the defendant, or that plaintiff was instrumental in causing the exhibits to be so taken by the jury. Especially, such verdict will not be set aside on appeal, when it has been approved by the trial court. (Neb.) Cudahay Packing Co. v. Skomal, 125 F. 470, 60 C. C. A. 306.

(f) *Juror by mistake picking up hat which plaintiff had worn at the encounter, introduced in evidence, and taking to jury room.*

After the conclusion of the instructions in an action for assault and battery, upon the jury retiring, one of the jurors by mistake picked up a hat which plaintiff had worn at the time of the encounter, and which had been introduced in evidence, showing a break or rent at a place which would be over or near the point of injury upon plaintiff's head, and carried it into the jury room. It was upon the table around which the jurors assembled, and used as a ballot box a part of the time, but was not used in any other way, and did not influence them. Held, an irregularity, but without prejudice to defendant. *Morris v. Miller*, 83 Neb. 218, 119 N. W. 458, 20 L. R. A. n. s. 907.

(g) *Improper evidence taken to the jury room.*

In an action for rent defendant offered two receipts to show payment of rent for months subsequent to the term for which the action was brought. One receipt did not show that it was for rent and was excluded, and the other

was admitted, but in sending the papers to the jury room by mistake the receipt excluded was sent, and the other was retained. Held, that as the receipts were only inferential evidence of the debt, and did not affect the amount, the mistake was without injury. *Nordsick v. Baxter*, 64 N. J. L. 530, 45 A. 915; *Smith v. Thirston*, 8 Ind. App. 105, 35 N. E. 520; *Dolan v. Insurance Co.*, 22 Hun (N. Y.) 396, *dist'g Mitchell v. Carter*, 14 Hun 448.

(h) *The taking of pleadings to the jury room, whether read in evidence or not, disapproved, but unless prejudice shown not reversible error.*

The practice of allowing pleadings to be taken to the jury room, whether read in evidence or not, is not a safe one, but its indulgence is not reversible error, in the absence of a showing of prejudice or injury. *Powley v. Swenson*, 146 Cal. 471, 80 P. 722; *R. Co. v. Buckley*, 102 Ill. App. 314, *judgm't affm'd*, 200 Ill. 260, 65 N. E. 708; *Traction Co. v. Wilson*, 120 Ill. App. 371, *judgm't affm'd*, 217 Ill. 40, 75 N. E. 436; *Bluedorn v. R. Co.*, 121 Mo. 258, 25 S. W. 943; *Schroder v. Lodge No. 188*, I. O. O. F. (Neb. Sup.), 139 N. W. 221.

(i) *Exception to jury immaterial where plaintiff in no event entitled to recover.*

Where the plaintiff excepted to the jury which omitted to find on one of the issues joined, it is not ground of reversal, if the plaintiff's declaration is so defective that no judgment could be rendered thereon in his favor. *Chapman v. Dixon*, 4 Harris & Johnson (Md.), 527; *Coale v. Harrington*, 7 Harris & Johnson (Md.), 147.

(j) *Continuing trial for absence of juror not shown to have injured appellant.*

A trial was commenced and, after the evidence was closed, the court adjourned until the next day, when,

one of the jurors failing to attend, the case, on motion of one party, the other objecting, was adjourned to a future day of the term. The defaulting juror was afterwards brought in by attachment, and the trial proceeded to a verdict and judgment. Held that, as it did not appear that the party who objected was injured by any irregularity in the proceeding, and, as the verdict was in strict conformity to the evidence, the judgment should not be reversed. *Hall v. Hann's heirs*, 35 Ky. (5 Dana) 55.

(k) *Refusal to permit jury, on retirement, to take papers received in evidence.*

Refusal to permit the jury to take papers received in evidence held not reversible error, Code, sec. 3717, not being mandatory. *Hraha v. Maple Block Co.* (Iowa Sup.), 135 N. W. 406.

(l) *Reassembling jury after their discharge to correct verdict.*

Where there was no dispute as to the amount plaintiff was entitled to recover, the action of the court in reassembling the jury after its discharge from further consideration of the case, for the purpose of correcting its verdict as to the amount thereof, was not such error as to require a reversal. *Fearnley v. Fearnley* (Col. Sup.), 98 P. 819.

Sec. 58. Right to open and close to the jury.

(a) *Denial of right to open and close.*

One sued on a note, who answered under oath denying generally and alleging that she was an indorser, and not a maker, was not prejudiced by any error in denying her the right to open and close. *Oexner v. Loehr*, 133 Mo. App. 211, 113 S. W. 727.

- (b) *Error as to right to open and close not ground for reversal.*

Where appellant was given the privilege of opening and closing at the trial; held, that the fact that the judge gave a construction of the pleadings under which he would not have been entitled to that advantage, afforded no ground for reversal, where no improper burden of proof was imposed upon him. *Rosenstein v. Fox*, 9 Misc. 449, 61 St. Rep. 122, 30 N. Y. Supp. 258, rev. o. o. g. 150 N. Y. 354, dist'g *Auerbach v. Peetsch*, 44 State Rep. 493, 18 N. Y. Supp. 452.

- (c) *Erroneous award of right to open and close.*

Where, in an action to recover rent, defendant entered a plea of the general issue, and a plea of actual eviction, and before the trial withdrew the plea of the general issue, and admitted the facts set up in the declaration to be true, and thereupon was given the right to open and close to the jury over plaintiff's objection; such action, if erroneous, is not ground for reversal, unless it appears that plaintiff was prejudiced thereby. *N. Y. Dry Goods Store v. Pabst Brewing Co. (Ill.)*, 112 F. 381, 50 C. C. A. 295.

- (d) *Permitting successful party to open and close the argument, if erroneous, does not warrant reversal.*

In a proceeding to establish a note as a claim against an estate, objected to as a forgery, error in permitting the successful party to open and close the argument, over objection, does not warrant a reversal. *Judgment*, 136 Ill. App. 417, rev. *Nagle v. Schnadt*, 239 Ill. 595, 88 N. E. 178.

- (e) *Plaintiff's concession to defendant to close cured error in awarding affirmative of issue to plaintiff.*

Plaintiff's concession to defendant of the final summing

up will cure an error in awarding the affirmative of the issue to the plaintiff. *Lake Ontario Nat. Bank v. Judson*, 33 St. Rep. 371, 122 N. Y. 638, 3 Sil. 90.

(f) *Fair trial cured refusal of right to open and close.*

Error in refusing to allow appellant to open and close is not sufficient of itself to reverse a judgment, where a fair trial has been had on the merits. *Tibeau v. Tibeau*, 22 Mo. 77; *McClintock v. Curd*, 32 Mo. 411; *Robinson v. City of St. Louis*, 97 Mo. App. 503, 71 S. W. 465.

Sec. 59. The Witnesses.

(a) *Where the sole issue is confined to price, allowing witness to testify as to quantity.*

Where the sole issue is as to price, the fact that a witness was permitted to testify as to quantity is not prejudicial. *Westerwater v. Pool Co.*, 12 O. C. C. n. s. 382, 22 O. C. D. 121.

(b) *Immaterial fact added by witness to material evidence, if not prejudicial, is immaterial.*

An immaterial fact superadded by the witness to material evidence, if not prejudicial, is not ground for reversal. *Dickey v. Beatty*, 14 O. S. 389.

(c) *A party after closing his testimony has no absolute right to recall a witness to establish matters in rebuttal.*

After a witness has been examined in chief, and is recalled in rebuttal, the court may very properly prevent a simple repetition of his testimony. A party, after his examination of a witness, and after closing his testimony, has no absolute right to recall this witness to establish matters in rebuttal. Whether this rule ought to be varied is a question for the circuit court; and the appellate

court, if it interferes at all, should only do so where it sees that injustice has been done through this action. *Coker v. Hayes*, 16 Fla. 368.

- (d) *Allowing a witness to testify from a book, without introducing it in evidence, is immaterial when some of the items are later properly admitted, the trial being to the court.*

To allow a witness to testify from a book, without introducing it in evidence, if error, is immaterial, when some of the items are later introduced in another document properly, as the trial was to the court. *McAllister v. People*, 28 Col. 156, 63 P. 308; so of allowing a witness to use a memorandum to refresh his memory, where others testified similarly, *Williamson v. Tobey*, 86 Cal. 497, 25 P. 65.

- (e) *Examining defendant on a matter not at issue, but his answers did not prejudice him before the jury.*

The fact that defendant was examined on a matter not at issue is not ground for a reversal of the judgment, where his answers did not prejudice him before the jury. *Mingey v. Mfg. Co.*, 6 O. C. C., n. s. 593, 15 O. C. D. 593.

- (f) *Where witness in giving proper testimony utters incompetent things.*

Because a witness in giving proper evidence utters some things not competent, is no reason for giving a new trial, unless prejudicial. It is not always possible to restrain a witness within adequate limits. *Blackburn v. Blackburn*, 2 O. 81.

- (g) *The propriety of permitting leading questions rests in the discretion of the trial judge.*

A leading question should be permitted only when it appears essential to justice; where a witness is per-

sistently unwilling or biased, or there exists some like reason, the court should allow it. In some cases a party may and should be permitted to lead his own witness. This matter, however, is in the discretion of the court, and appellate courts universally refuse to review such exercise of discretion. *Coker v. Hayes*, 16 Fla. 368.

(h) *Refusal to strike out an answer of a witness, on the ground of incompetency, when no objection was made to the questions, when asked.*

It is not reversible error for a court to refuse to strike out the answer to a question asked a witness, on the ground that the question was incompetent, where no objection was made to it when it was asked. *Bailey v. Warner*, 118 Fed. 395.

(i) *Admitting evidence of witness's understanding of a transaction.*

The admission of testimony as to what was the witness's "understanding" of a certain conversation, is harmless error where other conclusive evidence in the case shows that this understanding was correct. *Steine v. Eppinger* (Ala.), 61 F. 253, 9 C. C. A. 483.

(j) *Improper question to witness as to the value of property.*

In an action for damages for the wrongful and unlawful maintenance of certain stock yards as a nuisance, where the evidence fully sustains the plaintiff's right of recovery, and no claim is made, and it does not appear that the damages awarded by the jury are excessive, the asking of a witness as to what would have been the value of the property, with the objectionable features removed, and the stock yards kept in proper condition, though too informal, is not prejudicial, and no ground for a new trial. *Anderson v. R. Co.*, 80 Minn. 293, 84 N. W. 1021.

- (k) *Erroneous evidence which did not impeach the integrity of the witness.*

Evidence of a witness as to a conversation with plaintiff about paying witness to find out what a certain person would swear to, as to the subject matter of the action, did not tend to impeach such party or to reflect upon his integrity, and he could not have been prejudiced thereby. *Proffer v. Miller*, 69 Mo. App. 501.

- (l) *Refusal to allow witnesses to examine checks.*

On an issue as to the genuineness of a check on which suit was brought, the court refused to allow witnesses to examine checks admitted to be genuine, for the purpose of expressing an opinion as to the signature on the check in suit, but allowed each witness to testify positively that the signature to the check in suit was not genuine, and received in evidence three checks admitted to be genuine, and by agreement of both parties, allowed the jury to take the checks into their consultation room, for the purpose of comparison with the check in suit. Held, that defendant was not prejudiced by the refusal to allow the witnesses to examine the genuine checks. *Schroeder v. Seitz*, 68 Mo. App. 233.

- (m) *Refusal to permit witness to testify that machine would be more dangerous when out of order.*

Where, in an action by an employee for personal injuries sustained by reason of a defective machine, the machine was subjected to the jury, so that they could understand, from an inspection of it, whether or not it would be more dangerous when out of order; the refusal to permit a witness to testify as to whether or not it would be more dangerous when out of order was not prejudicial. *Dutzi v. Geisel*, 23 Mo. App. 676.

(n) *Erroneously limiting the number of witnesses.*

The fact that court erroneously held that the party had called the number of witnesses to give their opinion on a subject to which the court had limited the parties, is not ground for reversal where the party's rights were abundantly protected by the witnesses whom he was allowed to call. *Huett v. Clark*, 4 Col. App. 231, 35 P. 671.

(o) *Limiting witnesses to one proposition was not prejudicial.*

Any error in limiting the number of witnesses on any one proposition was not prejudicial, where defendant, though excepting to the ruling, did not offer any witnesses which were excluded under it. *Felver v. R. Co.*, 216 Mo. 195, 115 S. W. 980.

(p) *Refusing permission to cross-examine witness.*

Error in refusing to permit a defendant to cross-examine plaintiff's witness upon a certain subject is not prejudicial, where the inquiry on cross-examination would have been competent upon an examination in chief by defendant, and defendant might have called such witness as his own. *Randall v. Greenwood*, 3 Mont. 510.

(q) *Asking witness on cross-examination what he was arrested for.*

Where a witness has voluntarily stated that a certain affidavit produced by him in evidence was for evidence in another case, in which he had been under arrest, a question put to such witness on cross-examination as to what he was arrested for, if error, was not prejudicial. *Matusevitz v. Hughes*, 26 Mont. 212, 66 P. 939, 68 P. 467.

(r) *Erronous references by witnesses to change in K street.*

S. owning a lot situated at the intersection of Third

East street and K street in defendant city, claimed damages in her original petition from the grading of K street, as well as from the excavation of Third East street. The former claim was abandoned at the trial, and that portion of the petition referring to K street was stricken out, and the instructions directed the jury's attention solely to the damages sustained on account of the excavation of Third East street. Held, that references incidentally made by some of the plaintiff's witnesses to the change in K street were not prejudicial to defendant, it being improbable that the jury misunderstood the issues. *Taylor v. City of Jackson*, 83 Mo. App. 641.

(s) *Allowing a witness to refresh his memory from a memorandum made several years after the event.*

Allowing a witness to refresh his recollection from a memorandum made several years after the event, without a sufficient showing, under Code Civil Procedure, sec. 2047, is harmless, his testimony being merely that he was at a certain place on a day when plaintiff claimed to have there rendered medical services to defendant, and that he did not see plaintiff there, having at most only a slight tendency to contradict plaintiff, who testified to leaving such place that day on the morning train. *Kearney v. Bell* (Cal. Sup.), 117 P. 925; *Kinsey v. Md. Casualty Co. of Baltimore*, 15 Cal. App. 571, 115 P. 456.

(t) *Excluding memorandum where witness says he has no independent recollection.*

Where a witness testified that he has no recollection independently of the memorandum thereof made by him at the time, and then testifies from the memorandum fully as to all the matters therein referred to, the refusal to admit the memorandum itself in evidence is not prejudicial error. *Butler v. R. Co.*, 87 Iowa, 206, 54 N. W. 208.

- (u) *Permitting question to show arrest and conviction of witness cured when the fact was shown.*

Error, if any, in permitting questions respecting the arrest and indictment of a witness, for the purpose of affecting his credibility, is cured where his conviction is shown. *Donahue v. Wippert*, 7 Misc. Rep. 506, 28 N. Y. Supp. 495.

- (v) *Improper evidence volunteered by a witness.*

Where a proper question is put, and objection to it properly overruled, and the witness answers the question, and then proceeds to state matters not responsive to the question, and this voluntary testimony is, on objection, at once stricken out, unless the case be a very peculiar and very strong one, such fault or mistake of the witness will not justify a reversal of the judgment. *Hill v. Robinson*, 23 Mich. 24.

- (w) *Refusal to let witness refresh his memory and testify from actual entries.*

The refusal by the trial court to let a witness refresh his memory and testify from certain entries, he being unable to testify from memory, was not erroneous, or, if erroneous, was not prejudicial error, when the entries from which it was sought to have the witness refresh his memory had already been read to the jury, and were before them as evidence. *R. Co. v. Wallace*, 28 Neb. 179, 44 N. W. 223.

- (x) *Failure of witness to respond when called.*

When a witness, who has been in attendance during the progress of the trial, fails to appear when called, the court of errors will not reverse a judgment for that cause, no motion having been made to postpone the case or procure the testimony of the witness *de bene esse*, and

especially, when it appears that the evidence of the witness, had he been present, would have been cumulative only. *Read v. Barker*, 30 N. J. L. 378, 32 N. J. L. 477.

(y) *Where witness states he can not answer question, exception unavailable on appeal.*

Where, before the refusal of offered testimony, the witness has stated that he can not answer the question, the exception to the ruling will not be sustained on appeal. *Miller v. Sharp*, 65 Mich. 21, 31 N. W. 608.

(z) *Witness disclosing ignorance of matter improperly propounded.*

Where a witness, in his answer, discloses his ignorance of the matter as to which he was questioned; error in allowing the question is harmless. *Peck v. Snyder*, 13 Mich. 21; *Haupt v. Haupt* (Pa. Sup.), 15 A. 700.

(a-1) *Defendant's witness saying he did not find out on what car plaintiff was hurt.*

In an action against a street railroad company for injuries to a passenger, where one of defendant's employees testified that, on the day after the accident his superior asked him to find out by whose car the passenger was hurt, and that he thought he asked of the motormen who were working that day, defendant was not prejudiced by allowing him also to state that he did not find out on what car plaintiff was hurt. *Tunncliffe v. R. Co.*, 107 Mich. 261, 65 N. W. 226.

(b-1) *Improper question to which witness could not or did not reply.*

On the trial of a suit, the court permitted an improper question to be put to a witness, which, however, the witness was unable to answer. The allowance of the question was assigned for error; assignment dismissed.

Allen v. Rostain, 11 Sergeant & Rawle (Pa.) 362; Comon v. Smith, 2 Superior Court (Pa.) 474; Musser v. R. Co., 176 Pa. 621.

(c-1) *Excluding witnesses from testifying to circumstances to prove probable cause.*

In trespass for libel published defendants attempted to prove by two witnesses the circumstances on which the probable cause for belief was based, with the sources of information, but on cross-examination of the same witnesses the matters to which the offers related were brought out in full. The exclusion of the testimony was held not error. Coates v. Wallace, 4 Superior Court (Pa.) 253, 40 Weekly Notes Cas. (Pa.) 235.

(d-1) *Question as to the competency of a witness.*

In the trial of an action of A against B, the court submitted the case to a jury, and also reserving the question whether C, a witness introduced by A, was competent. The jury having found a verdict for A, the court decided that C was a competent witness, and answered B's points in the negative, and entered judgment on the verdict; B assigned for error the court's action in reserving the question as to C's competency as a witness. The supreme court being of opinion that such a proceeding, though erroneous, was harmless, since judgment was not entered non obstante veredicto, affirmed the judgment. Knerr v. Hoffman, 65 Pa. 126.

(e-1) *Refusal to plaintiff to examine a witness summoned by and attending on behalf of defendant.*

The plaintiff's counsel having stated that his evidence was closed, and the defendant's, that none would be introduced on his side, it is not error to refuse the plaintiff leave to examine a witness summoned by and attending

on behalf of the defendant, however material his testimony. *Cozart v. Lisle*, 19 Tenn. (Meigs) 65.

(f-1) *Permitting a witness to testify that another was addicted to the use of morphine.*

The error in permitting a witness for the successful party to testify that a witness of the defeated party was addicted to the use of morphine, where no finding had been made. Held harmless, where the defeated party could not recover under the evidence. (Okla.) *Winfrey v. R. Co.*, 194 F. 808, 114 C. C. A. 218.

(g-1) *Permitting witness to testify to values before proving his competency.*

Error in permitting a witness to testify to values, without his competency having been shown, and in stating facts from hearsay, were harmless and not ground for reversal of the judgment, where the competency of the witness was shown on his cross-examination, and the facts to which he testified upon hearsay were corroborated by the testimony of the adverse party. (Alaska) *Gilmore v. McBride*, 156 F. 464, 84 C. C. A. 274.

(h-1) *Permitting defendant's witness to be contradicted, without laying proper foundation therefor.*

Permitting defendant's witness to be contradicted, without the laying of a proper foundation therefor, is harmless error, where the court took from the jury the subject as to which the witness had testified, on the ground that there was no evidence for plaintiff. *Bogart v. R. Co.*, 72 Hun 412, 25 N. Y. Supp. 175.

(i-1) *Allowing witness, who had seen decedent sign his name twenty years before, to testify to the genuineness of the signature.*

Error, if any, in allowing a witness, who had seen

decedent sign his name twenty years before, to testify as to the genuineness of the signature claimed to be that of decedent, after witness had stated he was in doubt and could not swear one way or the other is harmless, since his testimony throws doubt upon, instead of tending to establish, the genuineness of the signature. In re Diggins, 68 Vt. 198, 34 A. 696.

(j-1) *Non-expert witness permitted to state what would occur if defective ports on vessel were left open.*

Permitting a witness, who was not an expert, to state what would occur if a person attempted to open a defective port on a vessel was not reversible error where, from his description of the condition of the port, the result of such an attempt would be obvious. (Wash.) Puget Sound Nav. Co. v. Lavender, 160 F. 851, 87 C. C. A. 555.

(k-1) *Non-expert witness allowed to state whether plaintiff's cattle had been struck by lightning.*

Where defendant introduced a witness as an expert, who testified that animals struck by lightning showed practically the same marks and indications testified to by a non-expert witness and other witnesses who testified for plaintiff, defendant was not prejudiced by the court's allowing such non-expert witness to give his opinion as to whether plaintiff's cattle, bearing such indications, had been struck by lightning. White v. Insurance Co., 97 Mo. App. 590, 71 S. W. 707.

(l-1) *Admitting testimony of witnesses to whom stomach of deceased, and a sample of the wood-alcohol, were sent for examination.*

In an action by a widow for the death of her husband caused by the negligent sale to him of wood-alcohol, error in admitting testimony of witnesses, to whom the

stomach of the deceased, and a sample of the liquid, were sent for examination, as to the statements of the persons delivering the stomach and sample, to whence they came, were not materially prejudiced where there was other competent evidence sufficient to show their identity and unchanged condition. *Campbell v. Brown*, 85 Kan. 527, 117 P. 1010.

(m-1) *Juror called as a witness and trial went on before eleven jurors.*

Though Revised Statutes 1895, art. 3141, provides that a witness in the case shall be disqualified to serve as a juror therein, where a juror was called as a witness, there was no error in refusing to permit a party to withdraw the announcement of ready, and to continue the cause, where the juror was excused with the consent of the parties, and the trial proceeded before eleven jurors. *Walker v. Dickey* (Tex. Civ. App.), 98 S. W. 658.

(n-1) *Question of veracity between witnesses contradicting each other determined by the jury.*

A jury having determined the question of veracity between two equally competent witnesses who contradict each other, the appellate court will not interfere. *Maxwell v. Agnew*, 21 Fla. 154.

(o-1) *Testimony of incompetent witness cured by proper proof.*

It is not ground for reversal that an incompetent witness was permitted to testify, where the fact to which he testified was otherwise fully proved, and not disputed. *Bank v. Bressler*, 38 Ill. App. 499.

(p-1) *Uninjurious admission of testimony of incompetent witness.*

The admission of the testimony of an incompetent wit-

ness is not ground of error, where the decree shows no injury to the party against whom it is given. *McKay v. Riley*, 135 Ill. 586.

(q-1) *Witness attempting to repeat his testimony while accompanying jury upon a view.*

Conduct of a witness for defendants, in attempting to restate his testimony while accompanying the jury upon the view, held not prejudicial to defendant. *Wood v. Moulton*, 146 Cal. 317, 80 P 92.

(r-1) *Ruling of incompetency cured by witness afterwards testifying.*

An erroneous ruling against the competency of a witness is of no avail on error by the party against whom it is made, where, by release, the witness is rendered competent and testifies; the error is harmless. *R. Co. v. Weldon*, 52 Ill. 290.

(s-1) *Witness testifying to quantity where question was as to quality.*

A judgment will not be reversed because a witness was permitted to testify to a matter having no bearing on the issue, as upon the question of quantity, where the only question is as to the quality, the error was harmless. *Braun v. Winans*, 37 Ill. App. 248.

(t-1) *A judgment will not be disturbed for refusing to order a separation of witnesses.*

A judgment will not be reversed on account of a refusal to order a separation of witnesses. *Detrick v. McGlone*, 46 Ind. 291.

(u-1) *Witness persisting in answering after objection cured by instruction to disregard it.*

Persistence of a witness in answering question after

objection sustained cured by instructions to jury to disregard it. *State v. Butterfield*, 75 Mo. 297.

(v-1) *Witness improperly calling a workman "boss."*

The fact that a witness, in the course of his testimony, called a workman "boss," is not ground for reversal, where all the facts and circumstances were before the jury. *Schillinger Bros. Co. v. Smith*, 128 Ill. App. 30, judgment affirmed, 225 Ill. 74, 80 N. E. 65.

(w-1) *Improperly permitting witness to use memorandum in testifying.*

Even though the court may have improperly permitted a witness to use a memorandum in testifying to questions of damage, a reversal will not be ordered where no prejudice appears to have resulted. *Nevois v. R. Co.*, 147 Ill. App. 113.

(x-1) *Testimony given by an unsworn witness.*

A new trial will not be granted on appeal, when a witness has given material evidence without being sworn, unless it be shown that the party complaining, or his attorney, did not know the fact until after the verdict. *Riley v. Monahan*, 26 Iowa 507.

(y-1) *In action for injuries opinions of witnesses that child suffered pain.*

Where, in an action for injuries to a child, his acts, exclamations and demeanor showed that he suffered great pain, the admission of opinions of witnesses that he suffered pain, if error, was not sufficiently prejudicial to warrant a reversal. *Boehm v. City of Detroit*, 141 Mich. 277, 104 N. W. 626, 12 D. L. N. 397.

(z-1) *Overruling objection to question to witness as to whether he had had trouble with his wife.*

Where, on cross-examination of a witness, who had

attempted to show plaintiff's loss of business through defendant's breach of contract, she was asked if he had not had trouble with his wife, and was accused in the newspapers of beating her, no prejudice resulted to plaintiff in overruling an objection, even if the question was improper, the answer not being in the affirmative, though, had it been, that fact may have had some bearing upon plaintiff's loss of trade, the witness being plaintiff's president and managing officer. *Canfield Lumber Co. v. Kint Lumber Co.* (Iowa Sup.), 127 N. W. 70.

(a-2) *Exclusion of party as a witness from the court room.*

A party to a cause should not ordinarily be excluded from the court room because he is also a witness, and this doctrine applies to the agent of a corporation whose duty it is to look after the interests of the corporation in the cause on trial; but where such agent is not excluded from the court room during the trial, and is not put on the stand as a witness, and nothing was offered to be proved by him, the corporation does not show any injury of which it can complain, because the court refused to except the agent from an order excluding all the witnesses from the court room during the trial. *R. Co. v. Smith*, 53 Fla. 375.

(b-2) *Witness improperly rejected cured by afterwards being admitted to testify.*

If a witness be improperly rejected, but subsequently admitted to testify, after being released by the party calling him, the error is thereby cured. *Ayres v. Vanliu*, 5 N. J. L. (2 Southard) 881; *R. Co. v. Welden*, 52 Ill. 290.

(c-2) *Where witness testified that certain machines burned were worthless, harmless error to prevent him giving his reasons.*

Where a witness, in an action on an insurance policy,

testified that certain machines burned were worthless, it is harmless error not to allow him to state his reasons for his opinion. *Stockton Corn Harvester and Agr. Works v. Insurance Co.*, 121 Cal. 167, 53 P. 565.

(d-2) *Not error in permitting question to witness where like questions to other witnesses were permitted.*

An error in permitting a particular question to a witness may be regarded as harmless, where answers to like questions to other witnesses were permitted to go to the jury without objection. *McCarty v. R. Co.*, 34 Ill. App. 273.

(e-2) *Refusal to permit witness to testify who had violated the exclusion rule.*

A refusal to permit a witness to testify because he had violated the rule excluding witnesses from the court room can not be made the basis for a reversal, where it does not appear that appellant was thereby prejudiced. *Johnson v. Dahle*, 85 Neb. 450, 123 N. W. 437.

(f-2) *In action for failure of carrier to transport within a reasonable time, permitting witness to state what was a reasonable time.*

In an action for damages for failure of a carrier to transport, within a reasonable time, the error in permitting a witness to state what was a reasonable time for such transportation, will not reverse in the absence of prejudice appearing. *Pinnell v. R. Co.*, 146 Ill. App. 150.

(g-2) *Permitting witness to explain the meaning of the terms of a written contract.*

Defendants can not complain on appeal that a witness was permitted to explain the meaning of the terms of a contract, the explanation being in accordance with the direct contention as to such meaning. *W. S. Forbes & Co. v. W. M. & J. J. Pearson*, 87 S. C. 67, 68 S. E. 964.

(h-2) *Allowing witness to testify through an interpreter, without examination as to his ability to testify in English.*

Allowing a witness to testify through an interpreter, without an examination as to his ability to testify in English, is not ground for reversal, a reading of his testimony leading to the conclusion that no injury resulted. *Hackart v. Decatur Coal Co.*, 243 Ill. 384, 90 N. E. 257.

(i-2) *Where a witness, unfamiliar with the English language, wrote a portion of his answer.*

Where a witness, by reason of his unfamiliarity with the English language, is unable to clearly express a fact, with respect to which he is testifying, and he expresses the fact in writing, the admission of the writing in evidence is not prejudicial error, as the writing, in fact, expresses what the witness is unable clearly to express orally, and the jury would probably treat the writing as but a repetition of the witness's testimony. *Poreba v. Illinois Midland Coal Co.*, 156 Ill. App. 140.

(j-2) *Permitting a witness to be asked on cross-examination whether he had not made a certain statement, which he denied.*

Permitting a witness to be asked on cross-examination whether he had not, at the adjournment, after examination in chief, made a certain statement to a certain person, if error, is harmless, there having been no attempt to prove that his answer, "No," was not the truth. *Willeford v. Bell* (Cal. Sup.), 49 P. 6.

(k-2) *Permitting a witness to state that the walk was in "bad shape."*

In an action for injuries from a defective sidewalk, error, if any, in permitting a witness to describe the walk as "in bad shape," is not prejudicial, where he subse-

quently detailed its condition. *Blake v. City of Bedford* (Iowa Sup.), 151 N. W. 74.

(l-2) *Instruction, that of two witnesses the one disinterested should be preferred.*

Where the court instructed the jury that when two witnesses swear differently, and one is a disinterested witness and the other a party to the suit, then, other things being equal, the evidence of the disinterested should prevail over that of the party to the suit; it was held that this language, though not approved, would not justify a reversal of the judgment. *Sullivan v. Collins*, 18 Iowa 228.

(m-2) *Incompetent and prejudicial statements of witness cured by instruction to jury to disregard them.*

Where a witness makes incompetent and prejudicial statements, it is the usual practice to order the same stricken, and where the jury are instructed not to consider them, their erroneous effect is ordinarily cured. *Conn. River Co. v. Dickinson*, 75 N. H. 353, 74 A. 585.

(n-2) *Court naming witnesses in an instruction.*

While it is advisable for the court not to name witnesses in an instruction, yet where an instruction as to the effect of the testimony as to the prior accident, named the only witnesses who testified on that subject, the naming of them was not matter of prejudice. *Dyas v. R. Co.*, 140 Cal. 296.

(o-2) *Instruction that if plaintiff has not brought a witness who might aid her cause the jury may consider that fact in weighing the testimony.*

An instruction that if plaintiff has not brought a witness who might aid her cause, the jury may consider

that fact in weighing all the other testimony in the case, though not strictly accurate, was not prejudicial to defendants. *Wade v. City of Mt. Vernon*, 117 N. Y. Supp. 356, 133 App. Div. 389.

(p-2) *In action for wrongful death, where the only witnesses for defendant are the motorman and conductor, instruction that interest of witness should be considered.*

In an action against a street railway for wrongful death, where the only witnesses for defendant are the motorman and conductor of the car which struck deceased, it is not prejudicial error to instruct that the relation between any witness and either party, and any interest the witness may have in the result of the suit, may be considered in determining the weight which ought to be given to his testimony, taking it in connection with all the other evidence in the case, and the facts and circumstances proved upon the trial. *Roberts v. R. Co.*, 177 Ill. App. 400.

(q-2) *Incompetent witness against incredible one, in equipoise.*

Where the evidence of an incompetent witness is admitted in a suit in equity it may be disregarded, and a reversal for the error avoided, if the story told by the witnesses for the other side is incredible and beyond the possibility of human belief. *Miller v. Slupsky*, 158 Mo. 643, 59 S. W. 990.

CHAPTER V.

EVIDENCE AND CORRELATED SUBJECTS.

- Sec. 60. Admission of secondary evidence without preliminary proof.
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Sec. 60. Admission of secondary evidence without preliminary proof.

- (a) *Admission of secondary evidence of contents of writings on insufficient proof of its absence.*

Admission of secondary evidence of contents of writing, on insufficient proof of its absence was harmless, where afterwards the loss was shown. *Leffle v. Watson*, 13 Ind. App. 176, 40 N. E. 1107; *Huff v. Curtis*, 65 Me. 287; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *W. U. Beef Co. v. Thurman*, 70 Fed. 960, 17 C. C. A. 542; *Robinson v. Bank*, 81 Cal. 111, 22 P. 478; *Challis v. Cable*, 37 Kan. 558, 15 P. 505; *Baker v. Gerrish*, 96 Mass. (14 Allen) 201.

Sec. 61. Admission or exclusion of evidence when tried to the court.

- (a) *Illegal evidence where tried to the court, where other evidence supports the judgment.*

Where a cause is tried by a court, without a jury, the

admission of illegal evidence will work a reversal, unless it appears without conflict that the other evidence would support the judgment. *Bank v. Chaffin*, 118 Ala. 246, 24 S. 80; *Whitney v. Buckman*, 13 Cal. 536; *White v. White*, 82 Cal. 452, 23 P. 776; *Reagle v. Dennis*, 8 Kan. App. 151, 55 P. 469; *Hastings v. Roll*, 62 Kan. 868, 64 P. 1114, affmg. 9 Kan. App. 882, 57 P. 1048; *Curd v. Lewis*, 31 Ky. (1 Dana) 351; *Andrews v. Hayden*, 88 Ky. 455, 10 Ky. L. R. 1049, 11 S. W. 428; *Lambert v. Lambert*, 23 Ky. L. R. 592, 63 S. W. 614.

(b) *Admitting or excluding evidence, where tried to the court.*

Where a case is tried without a jury, error in admitting or excluding evidence, where the result would or should not have been changed thereby, is error without injury. *Berlin Mach. Works v. Furniture Co.*, 112 Ala. 488, 20 S. 418.

(c) *In trial by the court receiving testimony subject to decision as to its admissibility.*

It is not necessarily reversible error, on a trial by the court, to permit the introduction of testimony, subject to the objection that it is incompetent and immaterial, reserving ruling thereon, and the right subsequently to disregard the same if determined to be inadmissible. *In re Moore's Est.* 88 Minn. 499, 93 N. W. 523; *Hogan v. Vinge*, Id.

Sec. 62. Agency.

(a) *Proving acts of before establishing the agency:*

That evidence of what the agent did, is admitted before evidence of the agency is given, and the agency is afterward proved, this irregularity is not ground for setting aside the verdict. *Bunting v. Allen*, 18 N. J. L. 299.

- (b) *Question to witness whether he delegated authority to agent to purchase or deal in stock on the market.*

On an issue as to whether the contract between the plaintiff and defendants was a margin contract, the question to plaintiff, "Did you delegate authority to your agent to purchase or deal in stocks on the market with any broker?" while improper, was not prejudicial to defendants. *Parker v. Otis*, 130 Cal. 322, 62 P. 571; rehearing denied, 130 Cal. 322, 92 Am. St. Rep. 56, 62 P. 927.

- (c) *Exclusion of agent's want of authority by proof offered.*

In an action for the purchase price of machinery, the exclusion of evidence that plaintiff's agent had no authority to sell the machines on any other terms than those stated in the printed warranty was harmless, where the court charged that if defendants had any knowledge of such warning it would govern the case. *Esterly v. Campbell*, 44 Mo. App. 621.

- (d) *Error to admit parol evidence of insurance agent's authority.*

In an action on an insurance policy issued by local agents whose authority is in writing, it is harmless error to admit parol evidence of their authority, where defendant does not deny under oath, when it files its plea, the execution of the policy. *Wooliver v. Insurance Co.*, 104 Mich. 132, 62 N. W. 149.

- (e) *Error in admitting testimony of statements of agent cured by agent's denial.*

The error, if any, in admitting testimony of the statements of agent as binding on the principal, is cured if the principal seeks to impeach such testimony by that of the agent, who denies that such statements were made.

Roux v. Blodgett & Davis Lumber Co., 94 Mich. 607, 54 N. W. 492.

(f) *Error in proving agency cured by proper instructions.*

The error arising from admitting evidence of agency, arising from the agent's statements made when the principal was not present, was cured by full instructions as to the incompetency of such evidence. Equitable Mtge. Co. v. Vore, 7 Kan. App. 629, 53 P. 153.

(g) *Self-serving declaration of agency.*

On a trial before the court, without a jury, in an action on a fire policy, the admission of testimony of a person to the effect that he was the agent of the defendant, though erroneous, is not cause for reversal of a judgment for plaintiff. McCullough v. Insurance Co., 113 Mo. 606, 21 S. W. 207; Carson v. Cummings, 69 Mo. 325.

(h) *Agency must be established before declarations thereof are received.*

The general rule is, that the agency must be established before the declarations of the agent are admissible; but if, after the declarations have been admitted, the agency is proved, this cures the error. Towell v. Klein, 44 Ind. 290, 15 Am. Rep. 235, 5 Ky. L. R. (abst.) 312; Hume v. Mason & Hoge Co., 122 Mich., 346, 81 N. W. 110, 6 D. L. N. 738; Taylor v. Penquite, 35 Mo. App. 389.

(i) *Erroneous instruction in action against del credere agent.*

Where, in an action by a principal against his agent to recover the price of goods sold by the latter under a del credere commission, the court erroneously charged that, in order to find for plaintiff, the jury must find that the goods were sold to a certain firm, and that this firm was

insolvent, defendant was not prejudiced by the error. *Suman v. Inman*, 6 Mo. App. 384.

- (j) *Instruction that a broker must show a retainer or that the principal accepted his agency and ratified his acts.*

An instruction that the broker to sell real estate must show a retainer, or that the principal accepted his agency and ratified his acts, is not prejudicial to the principal, although there is no evidence of ratification, where the jury are instructed as to what is necessary to constitute a ratification. *Duncan v. Borden*, 13 Col. App. 481, 59 P. 60.

- (k) *Appellant not injured by refusal to instruct as to whether party was acting as agent.*

Where the court correctly instructed on the subject of imputed negligence, and the jury found in favor of appellant in answer to special interrogatories on the question of fact, appellant was not injured by the refusal of an instruction withdrawing from the jury's consideration the question whether M, who was driving the horse at the time decedent was killed in a railroad crossing, was or was not acting as decedent's agent, and requiring the jury to impute M's negligence to decedent. *R. Co. v. Houghland* (Ind. App.), 85 N. E. 369.

- (l) *Instruction that if defendant acted as agent for both parties he could recover from neither.*

In an action against the maker of a note by the transferee, in which the defense was payment of the payee of the note by services rendered in obtaining a person who agreed to trade with the payee of the note for a parcel of land, the court, in an instruction, required the jury to find whether there was an agreement to trade between

the defendant and the person introduced to him by defendant. There was no dispute that such an agreement was, in fact, made, the plaintiff's only contention at the trial being that defendant acted as agent for both parties, and therefore could not legally exact commissions from either. Held, that the instruction was not prejudicial to plaintiff. *Rider v. Cupp*, 68 Mo. App. 527.

(m) *Error in failing to instruct jury to find whether agent had authority.*

There being no question as to authority of the person claiming to have acted as agent; held, that there was no prejudicial error in failing to direct the jury to find as to whether or not such agent had authority. *Siltz v. Insurance Co.*, 71 Iowa 710.

(n) *Error in charge in action by agent for salary.*

In charging the jury in an action by an agent to recover a balance due on salary, the court said, "Now, I give you another set of figures based on another claim on the part of the defendant." The figures showed a less amount than the claim of the plaintiff, and conformed to the testimony of a witness for defendant. Held, that the statement of the court was not cause for reversal. *Lee v. Huron Indemnity Union*, 135 Mich. 291, 97 N. W. 709, 10 D. L. N. 740.

(o) *Charge that principal ratified agent's authority, the same being undisputed.*

Where an agent's authority in the premises is established by undisputed testimony, a charge authorizing the jury to find that the principal ratified the agent's action is not error, although there is no evidence justifying the same. *Antrim Iron Co. v. Anderson*, 140 Mich. 702, 104 N. W. 319, 112 Am. St. Rep. 434, 12 D. L. N. 314.

- (p) *Erroneous instruction as to agency, but judgment correct.*

In an action against a carrier to recover damages for the breach of a verbal contract to receive and ship cattle, the undisputed evidence showed that its station agent, who made the contract, was authorized to receive and forward freight, and that the making of the contract in question was within the scope of his apparent authority, and it was not shown that plaintiffs had knowledge of the fact that he was acting beyond his authority. Held, that it was not prejudicial error for the court to direct the jury to the fact that the evidence was sufficient to establish the authority of defendants agent to make the contract, as the jury, under a proper instruction, could not have found otherwise. *Wilson v. R. Co.*, 66 Mo. App. 388.

Sec. 63. Bills of lading.

- (a) *Admitting bills of lading in evidence without proof of execution.*

Admission in evidence of bill of lading, without proof of execution, is harmless error, where admissions by defendant show that they were not necessary to prove plaintiff's case. *Aug. Wright Co. v. Hodges*, 87 S. C. 560, 70 S. E. 316.

- (b) *Admitting secondary evidence of contents of bills of lading.*

In an action for the price of goods, where it was manifest that there was a genuine bill of lading, and the contention was, not upon its existence or contents, but upon the legal consequences of indorsing it to a third person, it is not cause for a new trial that the court may have erroneously admitted secondary evidence of its contents, without the omission to discover and produce the original

having been fully accounted for. *Kelly v. Kaufman Milling Co.*, 92 Ga. 105, 18 S. E. 363.

Sec. 64. Conclusions as evidence.

- (a) *Not error when merely a conclusion from other evidence.*

It is not ground of error where it is merely a statement of a legal conclusion arising from evidence already before the court. *Mead v. Altgelt*, 136 Ill. 298.

- (b) *Sustaining objection to answer stating a conclusion is harmless when witness gives the evidence on which it is based.*

Evidence that a witness "had observed evidence of the railroad track having been tampered with," was responsive to an interrogatory to which there was no objection. Held, that the error in sustaining an objection to the answer was harmless, where the witness stated, in detail, the "evidences" that the railroad track had been tampered with, and his testimony, if believed, showed that it had been tampered with. *R. Co. v. Bailey*, 112 Ala. 167, 20 S. 313.

- (c) *Improper admission of conclusion cured by proper evidence.*

In an action for personal injuries caused by a defective sidewalk, the conclusion of plaintiff's witness as to the condition of the sidewalk was inadmissible; but defendant was not injured by its admission, where it was shown by witnesses on both sides, and most conclusively, that there was a board loose in the sidewalk which caused plaintiff's fall. *Bradley v. City of Spikardsville*, 90 Mo. App. 416.

- (d) *Conclusions accompanied by statement of the facts upon which they are based are not prejudicial.*

The error, if any, in permitting a witness to state con-

clusions, is not prejudicial, where the conclusions were accompanied by a statement of the facts from which the same were drawn. *Dollar v. Bank* (Cal. App.), 109 P. 499.

(e) *In an action for unlawful detainer of land, error in asking question calling for a legal conclusion.*

In an action for unlawful detainer of land, defendant answered that he held over under an oral agreement entered into before the expiration of the original period, by the terms of which he was to hold for another like period, and he was asked whether he held the premises at that time under the original lease or the subsequent agreement. Held, though the question asked for a conclusion rather than a fact, error in admitting it was harmless, since it was evident that defendant claimed to hold under the verbal agreement. *Schweikert v. Seavey*, 130 Cal. xxiii, 62 P. 600.

(f) *Erroneous answer stating a conclusion.*

Though an answer of a witness was technically objectionable as stating a conclusion, its admission was harmless where the subject was fully covered by subsequent testimony of the same witness, showing in detail the circumstances which he summarized in his objectionable answer. *Churchill v. Mace*, 148 Mich. 456, 111 N. W. 1034, 14 D. L. N. 13.

(g) *Error in permitting a witness to state a conclusion.*

Error in permitting a witness to state a conclusion is without prejudice, where he had previously stated the facts on which it was based. (Wash.) *Columbia Box & Lumber Co. v. Drown*, 156 F. 459, 84 C. C. A. 269.

(h) *Question calling for conclusion properly answered.*

In an action for injuries received by the breaking of a

board in a scaffolding, a witness was asked to state whether the defect could have been easily discovered, to which he answered, "Yes, certainly yes; the place where H (plaintiff) broke through was rotten." Held that, while the question was calculated to elicit a conclusion the latter part of the answer rendered any error therein harmless. *Hester v. Jacob Dold Packing Co.*, 95 Mo. App. 16, 75 S. W. 695; *Shafstetle v. R. Co.*, 175 Mo. 142, 74 S. W. 826; *City of Iola v. Farmer*, 72 Kan. 620, 84 P. 386.

(i) *Question calling for conclusion and opinion cured by subsequent cross-examination.*

Even if the question asked witness, in a suit for divorce for desertion and non-support, whether she did or said anything to plaintiff to induce her not to live with defendant, calls for a conclusion and opinion, it is harmless, defendant having cross-examined witness and been allowed to elicit the facts and test her credibility. *Turner v. Turner*, 60 N. E. 718, 26 Ind. App. 677.

(j) *Stating a conclusion when all the facts are in evidence.*

Allowing a witness to state a conclusion, all the facts being in evidence, and the conclusion being self-evident, is harmless. *Farmouth v. U. P. Coal Co. (Utah)*, 89 P. 74; *R. Co. v. Reiter*, 47 Col. 417, 107 P. 1190.

Sec. 65. Conflicting evidence.

(a) *Weak conflicting evidence tending to establish negligence.*

The testimony tending to establish negligence was weak, and was contradicted by positive evidence, but the court held that the killing of the mare was caused by the negligence of appellant's employees, and, in such case, the rule is to affirm the judgment, whether the finding

on the facts meets the approbation of this court or not. *R. Co. v. Wallace*, 2 Tex. Civ. App. 270.

Sec. 66. Consideration.

(a) *Instruction submitting issue of failure of consideration improperly pleaded.*

Where, in an action by an alleged bona fide purchaser of a note claimed to have been fraudulently obtained, there was evidence that the payee obtained the note fraudulently and without consideration, the error, if any, in submitting the issue of failure of consideration, because not properly pleaded, was not prejudicial. *Bank v. Romine*, 154 Mo. App. 624, 136 S. W. 21.

(b) *In action on note by indorsee, court directed jury to disregard evidence attacking the consideration.*

In an action on a note by an indorsee, defendant was permitted to introduce evidence attacking the consideration, but at the close of the evidence, there being no evidence tending to support any knowledge on the part of the plaintiff of want of consideration, the court properly instructed the jury to wholly disregard all evidence as to that defense. Held, that there was no ground for reversal. *Fowles v. Bebee*, 59 Mo. App. 401.

(c) *Overruling demurrer to reply alleging want of consideration.*

Where, in a personal injury action, the answer tendered the issue of payment and settlement, and a paragraph of the reply was a general denial, the overruling of a demurrer to another paragraph of the reply alleging that there was no consideration for the settlement, was not prejudicial to the company, since the evidence pertinent to the issue was admissible under the answer and the denial in the reply. *Ind. Union Traction Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203.

- (d) *Where plaintiff had no valuable consideration to support additional promise, he can not complain of smallness of recovery.*

The complaint on a written guaranty of a past due debt, which does not purport a consideration, not having averred facts showing a consideration, but merely having averred that a promise made fifteen days after a sale to defendant by plaintiff's debtor was for a valuable consideration, which is but a conclusion of the pleader, authorizes no recovery, so that plaintiff may not complain of the smallness of his recovery. *Kingan & Co. v. Orem*, 38 Ind. App. 207, 78 N. E. 88.

Sec. 67. Conversations as evidence.

- (a) *Error in admitting a conversation was harmless.*

Where, in a suit to enforce a subcontractor's mechanic's lien, the principal contractor testified that he was the principal contractor for the owner, and the owner did not deny such testimony, and admitted his acceptance of the house from the principal contractor, the error in admitting evidence of a conversation between plaintiff and the principal contractor, to the effect that the principal contractor was the owner's contractor, was harmless. *Schluter v. Wiedenbrocker*, 23 Mo. App. 440; *Cross Shoe Mfg. Co. v. Gardner*, 1 Kan. App. 721, 41 P. 984; *May v. Ullrich*, 132 Mich. 6, 92 N. W. 493, 9 D. L. N. 497.

- (b) *Erroneous admission of conversation between defendant and an agent of plaintiff in regard to rent.*

In an action on an implied agreement to pay rent, where defendant was a tenant by sufferance, the admission in evidence of a conversation between defendant and an agent of plaintiff in regard to the amount of rent to be paid, which did not result in an agreement, even if error, was without prejudice to defendant. *United States*

v. Whipple Hardware Co. (N. J.), 191 F. 945, 112 C. C. A. 357.

(c) *Admission of conversation between two witnesses.*

The admission in evidence of the conversation between two witnesses on the occasion when they saw the deceased, a very few days before his death, showing an expression of opinion as to his condition the same as that to which they testified, is not prejudicial error. Insurance Co. v. Lathrop (Mo.), 111 U. S. 612, 28 L. Ed. 536.

(d) *Improper reception of conversation cured by instruction to disregard it.*

In an action on a fire policy, evidence having been erroneously received to show a conversation between plaintiff and defendants' errand boy, who delivered the policy, in order to show a waiver of the defense against other insurance, such error was cured by an instruction excluding it from the jury. Stavinow v. Insurance Company, 43 Mo. App. 513.

Sec. 68. Credits.

(a) *Defendant over-credited can not complain of error in allowing interest.*

Defendant can not complain of an error in allowing interest where he has been allowed credits greater in amount, to which he was not entitled. Slack v. Bank, 19 Ky. L. R. 1684, 44 S. W. 354.

(b) *Refusal to charge the jury not to allow certain credits.*

The refusal of the court to charge the jury not to allow plaintiff credit for certain items was not prejudicial to defendant, where the jury did not allow plaintiff any such credit. Frizelle v. Kaw Valley Paint & Oil Co., 24 Mo. App. 529.

- (c) *Improper charge against appellant offset by improper credit of like amount to him.*

There can be no reversal for an improper charge made against appellant, where it is offset by a credit of a like amount improperly allowed him. *McNamara v. Schwanger*, 106 Ky. 1, 20 Ky. L. R. 1667, 49 S. W. 1061.

- (d) *Evidence of the value of a security at the time it was sold and applied as a credit.*

Where the maker of a secured note pleaded payment, in an action on the note, and introduced evidence to show that the security had been turned over to the holder in payment, the erroneous admission of evidence as to the value of the security at the time it was sold and applied as a credit is harmless, as being irrelevant to the issue. *Milbank-Scampton Milling Co. v. Packwood*, 154 Mo. App. 204, 133 S. W. 667.

- (e) *Evidence as to whom the credit was extended.*

In an action against an alleged partnership, defendants can not complain of the action of the court in permitting plaintiff to testify to whom credit was given when he extended the credits, where the testimony was but the statement of a fact necessarily inferable from his testimony already in, that he understood he was dealing with a copartnership whose members were composed of defendants, as such testimony could not have prejudiced defendants, even if inadmissible. *Schultze v. Steele*, 69 Mo. App. 614.

Sec. 69. Cross-examination.

- (a) *Cross-examination on matters not testified to in chief.*

Where it appears that no injury resulted to plaintiff in error, a judgment will not be reversed merely because the court at the trial permitted a witness, on cross-exam-

mation, to be interrogated as to matters pertinent to the issue, but about which he had not testified in chief. *Willis v. Russell*, 100 U. S. 621, 25 L. ed. 607; (*Minn.*) *Sauntry v. U. S.*, 117 F. 132, 55 C. C. A. 148.

(b) *Cross-examination to an extent not justified by the direct examination.*

Where an attorney for plaintiff, in an action for personal injuries is called as a witness by defendant, cross-examination by plaintiff to an extent not justified by the direct examination and developing evidence which he could have introduced by calling the witness himself, is harmless error. *Niemyer v. Washington W. P. Co.* (*Wash. Sup.*), 88 P. 103.

(c) *Error in use of a letter in cross-examination cured by instruction to jury to disregard it.*

Error in permitting the improper use of a letter on the cross-examination of a witness is cured by instructing the jury that such letter is not to be taken as evidence of the truth of any of its statements, or allowed to be used for the purpose of cross-examination. *Decree*, 29 App. D. C. 460, *affm'd*, *Turner v. American Surety & Trust Co.*, 213 U. S. 257.

(d) *Answer of witness cured erroneous cross-examination.*

Possible error in allowing a buyer to be cross-examined as to whether he put up his sign on the saloon sold to defraud creditors of the seller, where answered in the negative, was not prejudicial. *Gallick v. Bordeaux*, 22 *Mont.* 470, 56 P. 961.

(e) *Proper evidence elicited by irregular cross-examination.*

Where competent evidence is elicited by an irregular cross-examination, a new trial will not be granted on account of such irregularity unless it is apparent that some

injury has resulted therefrom. *Dodge v. Chandler*, 13 Minn. 114 (Gilman), 105.

(f) *Harmless improper cross-examination.*

Plaintiff testified on his own behalf. On cross-examination he was questioned concerning facts relied on as a defense, and which had not been previously brought out in the case. The cross-examination would be proper later on in the case. Held, that the error was harmless. *De Lissa v. Fuller C. & M. Co.*, 59 Kan. 319, 52 P. 886.

(g) *Proving on cross-examination facts prejudicial to plaintiff and not within the scope of direct examination.*

Plaintiff was not prejudiced by the court's permitting defendant to prove on the cross-examination of plaintiff's vice-president certain facts prejudicial to plaintiff's case, not within the scope of the witness's direct examination, where defendant might have called the witness in his own behalf and elicited the same testimony in his defense. (*Washington*) *California Fruit Cannery Ass'n v. Lilly*, 184 F. 570, 106 C. C. A. 550.

(h) *Refusal to permit cross-examination cured by other evidence.*

Error in refusing to permit cross-examination of plaintiffs' witness as to the extent of his admitted interest in the suit is not ground for reversal, where other evidence shows that for purposes of collection the witness had assigned to plaintiffs his account against defendants, which constituted one of the causes of action. *Heferlin v. Karman*, 30 Mont. 348, 76 P. 757.

(i) *Error in curtailing the cross-examination.*

In an action to recover the value of fruit trees destroyed by defendant, after plaintiff's witnesses had testi-

fied as to the value of the several kinds of fruit trees, and on cross-examination as to the distances they were apart, the court refused to permit them to be asked if they believed the acreage value which their figures would lead to, was correct. Held, that such curtailing of the cross-examination is not reversible error, since defendant could easily, from such data, have calculated the acreage value and presented it in his argument to the jury. *Cooley v. R. Co.*, 149 Mo. 487, 51 S. W. 101; *Jakway v. Rivers* (Col. App.), 108 P. 999; *Kennedy v. Modern Woodmen of America*, 243 Ill. 560, 90 N. E. 1084; *Sunberg v. Babcock*, 66 Iowa 515, 24 N. W. 19; *Edwards v. Heuer*, 46 Mich. 95, 8 N. W. 717.

(j) *Answer in rebuttal cured erroneous exclusion on cross-examination.*

The erroneous exclusion of questions put to plaintiff on his cross-examination is not prejudicial, where he is asked the same question when called in rebuttal, and the answers desired by the defendant to the excluded questions were drawn from the witness. *Rice v. Rankans*, 101 Mich. 378, 59 N. W. 660.

(k) *Cross-examination cured defect in direct examination.*

Where a witness testified as to the result of a conversation, without having testified that he was present; held, that any error in refusing to sustain an objection on that account was error without prejudice, in view of the cross-examination by the opposite party. *Seekel v. Norman*, 78 Iowa 254.

(l) *Cross-examination cured improper admission of evidence.*

Plaintiff read from stenographer's notes of the evidence on a former trial what the agent of defendant had testified to concerning his prior acts and statements in deal-

ings with persons from whom he received an application for insurance. The evidence was objected to, for the reason that the statements were not part of the *res gestae*, having been made long after the transactions to which they related, and hence not binding on the principal. The objection being overruled, defendant asked leave of the court, and was permitted to read all of the testimony of the witness at said former trial as cross-examination. After plaintiff had rested its case, defendant put the witness upon the stand, and he was fully examined by both parties. Held, that if any error was committed in the admission of said statements of the agent the same was cured by the subsequent action of defendant. *Insurance Co. v. Bank*, 60 Kan. 630, 57 P. 524.

(m) *Allowing testimony on defendant's cross-examination as to competency of a surveyor.*

Allowing a witness, on defendant's cross-examination, to testify as to competency of a surveyor, was not reversible error. *St. Louis Stave & Lumber Co. v. United States* (Ark.), 177 F. 178, 100 C. C. A. 640.

(n) *Exception on cross-examination not available, as witness might have been called and asked the question in chief.*

Where the court sustains an objection to a question asked on cross-examination, as not being a proper subject of cross-examination, and the party has opportunity to call the witness and ask the question on examination in chief, the exclusion of the question will not be considered harmful error. *Bonnett v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250.

(o) *Sustaining objection to question on cross-examination, whether medical authorities agree that paralysis of spinal origin must exist on both sides.*

Where a physician, testifying that he found an anes-

thetic area about the lower portion of the spinal column of plaintiff's body, more pronounced on the right side than on the left, expressly declared that he had neither heard nor read of a case where there was a spinal injury, with resulting paralysis of one side of the body only, the sustaining of an objection to a question, on cross-examination, whether medical authorities did not state that paralysis of spinal origin must exist on both sides, was not prejudicial. *Griffith v. Los Angeles Pac. Co.* (Cal. App.), 111 P. 107.

(p) *Error in refusing testimony on cross-examination cured by testimony later as to the facts sought.*

Error in refusing to permit the maker of a note to testify on cross-examination as to the circumstances under which he signed the note, the witness having been called by plaintiff for the purpose simply of proving his signature, is cured by his testimony in his own behalf in regard therein. *Adams v. Farnsworth* (Cal. Sup.), 37 P. 221.

(q) *Defendant not prejudiced by court excluding, on cross-examination, question touching her (plaintiff's) credibility.*

Where the evidence in an action, without regard to the testimony of plaintiff, was such that the jury could not well have found a verdict for defendant, defendant was not prejudiced by a ruling of the court excluding questions asked plaintiff as a witness, on cross-examination, touching her credibility. *Becker v. Shutte*, 85 Mo. App. 57.

Sec. 70. Cumulative Evidence.

(a) *Exclusion of proper evidence that would have been merely cumulative.*

The exclusion of proper evidence will not reverse,

where such evidence would have been merely cumulative. *R. Co. v. Walters*, 120 Ill. App. 152, judgment affirmed, 217 Ill. 87, 75 N. E. 441; contra, *Grath v. Mound City Roofing Tile Co.*, 121 Mo. App. 245, 98 S. W. 812; not error to exclude proper evidence merely cumulative, *Clement v. Brown*, 30 Ill. 43; *Patterson v. R. Co.*, 178 F. 49, 102 C. C. A. 95; contra, *Wm. Laurie Co. v. McCullough* (Ind. Sup.), 92 N. E. 337, rehearing denied, 90 N. E. 1014.

(b) *Inadmissible evidence that is merely cumulative.*

The judgment will not be reversed because of the admission of inadmissible evidence, where the evidence merely tended to prove what was already clear. *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443; *Upchurch v. Mizell*, 50 Fla. 456; *Cropper v. City of Mexico*, 62 Mo. App. 385; *R. Co. v. Wyatt*, 104 Tenn. 432, 58 S. W. 308.

Sec. 71. Custom or usage.

(a) *Erroneous proof of custom in the tobacco trade.*

Where, in an action for the breach of a contract of sale of tobacco by sample, a seller refused to perform, and admitted that he could not furnish the lot sold, the admission of evidence of a custom in the trade whereby purchasers of tobacco by sample were allowed to inspect the goods before paying for them, if error, was harmless. *Walker v. Cooper*, 97 Mo. App. 441, 71 S. W. 370.

(b) *Exclusion of testimony as to custom cured by testimony of none such.*

The exclusion of evidence as to what meaning, in making certain theatrical contracts, is placed upon the words, "subject to rules and regulations," it being sought to establish a custom as to notice before the discharge or leaving employment of two weeks' notice from either party; held, to be cured by subsequent testimony by the

witness that there was no such custom. *Ince v. Weber*, 18 Misc. 254, 41 N. Y. Supp. 396, 75 St. Rep. 808.

(c) *Submitting the question of the existence of a custom to use coal oil in kindling fires.*

Submitting the question of the existence of a custom to use coal oil in kindling fires is harmless error, where the custom in the community is so universal as to justify the court in taking judicial notice thereof. *Judgm't*, 18 Okl. 107, 89 P. 212, *affm'd*, *Waters-Pierce Oil Co. v. Deselson*, 212 U. S. 159, 53 L. ed. 453, 29 S. Ct. 270.

(d) *Evidence of custom to leave marble work out of doors.*

In an action for damages to marble monuments standing in plaintiff's marble yards, while evidence of a custom among marble workers to leave their work out of doors is inadmissible, its admission is harmless error, since plaintiff has a right to leave his monuments out of doors, if he choose. *Skelton v. Fenton Electric Light & Power Co.*, 100 Mich. 87, 58 N. W. 609.

(e) *Admission of incompetent evidence of custom to establish negligence of defendant in failing to guard gearing in a saw-mill.*

The admission of incompetent evidence of custom to establish the negligence of a defendant in failing to guard a gearing in a saw-mill, was error without prejudice, in view of Statutes 1898, sec. 1636j, which imposes the duty of boxing such gearing, as matter of law. *Hoffman v. Rib Lake Lumber Co.*, 136 Wis. 388, 117 N. W. 789.

(f) *Where general custom was shown to leave receipts for assessments on life insurance with third person for collection, excluding evidence that practice was not authorized.*

Where a general custom was shown for the secretary

of a subdivision of a mutual life insurance order to leave receipts for assessments with a third person for collection, the exclusion of evidence, in an action on a policy, offered to show that such practice was not authorized by the association, held not prejudicial error. *Locomotive Eng. M. L. & Ac. Ins. Ass'n v. Thomas* (Kan.), 206 F. 409, 124 C. C. A. 291.

(g) *Refusal to allow witness to testify to custom of laborers, when he had told all he knew.*

It is a harmless error to refuse to allow a witness to state what the custom was as to laborers looking out for the movement of a car which they were unloading, where the existence of such a custom is neither shown nor offered to be proved, and the witness is allowed, in response to other questions, to tell all he knows in regard to the matter. *N. C. Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186.

(h) *Exclusion of evidence to show custom of longshoremen in placing covers on hatches.*

In an action by a longshoreman against the owner of a vessel by whom he was employed, to recover for an injury resulting from his falling through a hatch, owing to one of the covers being too short, where it was shown that plaintiff assisted in putting such cover in place, the exclusion of evidence to show that a general custom of longshoremen, when placing such covers which were too short, to chock the ends, was not prejudicial to the defendant, since, if plaintiff knew, or should have known, of the defect, he was guilty of contributory negligence in stepping upon the cover, irrespective of any failure to chock it, while, if he did not know, and the defect was not obvious, he was not chargeable with negligence, and any negligence of a fellow-servant, as a concurring cause of the accident, in connection with the negligence of de-

defendant in failing to supply the proper appliance, would not constitute a defense. (N. Y.) *International Mercantile Marine Co. v. Fleming*, 151 F. 203, 80 C. C. A. 479.

- (i) *Testimony as to the custom of drivers to see that everything was clear of the wagon before starting.*

Where a driver admitted that he started without any warning and without looking to see if anyone was in a dangerous position; held, that testimony as to the custom of drivers to see that everything is clear of the wagon before starting, was not prejudicial. *Layng v. Mt. Shasta Mineral Springs Co.*, 135 Cal. 141, 67 P. 48.

Sec. 72. Declarations as evidence.

- (a) *Defendant not injured by declaration of engineer forty-five minutes after the accident, that it happened from negligence.*

Where, in an action for injuries to a locomotive fireman in a collision, there was uncontradicted evidence from which the jury could have fairly inferred negligence of defendant's engineer, defendant was not harmed by the introduction of the declaration of such engineer, made forty-five minutes after the accident, admitting that the accident was the result of his own carelessness. *R. Co. v. Osborn*, 39 Ind. App. 333, 78 N. E. 248, 79 N. E. 1067.

- (b) *Where both parties in will contest introduce declarations of testator, neither can be heard to say same are incompetent.*

Both parties introducing in will contest declarations of testator, neither can be heard to say same are incompetent. *Moyer v. Swaggart*, 125 Ill. 262.

- (c) *Admission of father's declaration that he refused consent to son's marriage.*

In an action for the alienation of plaintiff's husband's

affections, the admission of declaration of defendant, the husband's father, that he refused consent to the marriage, though error, was harmless, as all the evidence tended to show that fact, and it was practically admitted. *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255.

(d) *Admitting declaration by the party injured, made about four minutes after the accident.*

Where, in a personal injury action, defendant admitted that plaintiff was injured in the accident, the error, if any, in admitting declarations made by the person injured about four minutes after the accident, to the effect that he had been injured, was not prejudicial. *Murphy v. R. Co.* (Nev. Sup.), 101 P. 322.

(e) *Erroneous admission of declaration of motorman made after accident.*

In an action for injuries caused by collision between plaintiff's wagon and defendant's street-car, the erroneous admission on behalf of plaintiff, of declaration of a motorman, made after the accident, that he "could not help it," is not prejudicial error, since it tends no more to show his negligence than the absence thereof. *Rogers v. R. Co.*, 84 N. Y. Supp. 974.

(f) *Denial of right to examine plaintiff as to certain declarations, in action by father for abducting daughter for immoral purposes.*

In an action by a father for abducting his daughter for immoral purposes, where the daughter was examined as to declarations made to her father while he was carrying her home, and witnesses were afterwards examined to contradict her testimony, defendants were not prejudiced by not allowing them to examine plaintiff as to such declarations. *Dobson v. Cothran*, 34 S. C. 518, 13 S. E. 679.

- (g) *Admitting declaration of defendant's superintendent, "This is Armour's team that has done this, and we are liable."*

In an action for injuries to plaintiff by defendant's run-away team, a witness testified that C, defendant's superintendent, was at the scene within a few minutes after the accident, and identified the team as belonging to defendant. In reply to a general question as to what the superintendent said, the witness answered: "This is Armour's team that has done this, and we are liable." On objection, the court allowed the answer to stand de bene, and stated that he would instruct the jury, without other testimony, that it had no effect, and as to the question of liability it had no probative value. During the trial it was admitted that C was defendant's local superintendent, and that the team belonged to defendant, and the court expressly charged that C's statement could not be considered at all as an admission of liability. Held, that defendant was not prejudiced, under such circumstances, by the admission of such answer. *Armour & Co. v. Skene* (Mass.), 153 F. 241, 82 C. C. A. 385.

- (h) *In action for water-rights, admission of R's declaratory statement that his entry was made while land was Indian country.*

Where, in an action to determine water-rights, there was ample proof that R was living on certain of the land before and at the time plaintiff's water-right was located; plaintiff was not prejudiced by the admission in evidence of R's declaratory statement, pursuant to his entry, showing that the entry was made while the land was Indian country. *Redwater Land & Canal Co. v. Reed* (S. D. Sup.), 128 N. W. 702.

- (i) *Admission of declaration of defendant as to gift of property attached to interpleader.*

The admission of declarations of defendant as to a gift of property attached to the interpleader was not injurious to the plaintiff, where both defendant and interpleader testified that the property belonged to the interpleader, and the evidence they brought out in the inquiry as to third parties knowing to whom the property belonged. *Fair v. Wynne*, 155 Mo. App. 341, 137 S. W. 78.

- (j) *Error in admitting declarations cured by instruction withdrawing from consideration of the jury.*

Error in admitting declarations on the part of a pit boss as to the cause of a miner's death, for which suit was brought, was cured by an instruction withdrawing such evidence from the consideration of the jury. *Smith v. Little Pittsburg Coal Co.*, 75 Mo. App. 177.

- (k) *In garnishment proceeding, erroneous declaration by defendant cured by charge.*

In garnishment of a fund held by an insurance company for the payment of a policy in favor of the principal defendant, where it appeared that such defendant had assigned the policy, the erroneous admission as against the assignee, of declaration of such defendant, made after the assignment, that he intended to apply the proceeds of the policy in payment of his debts was harmless, where the court charged that, if the assignment was made in good faith to secure a bona fide debt, the assignee was entitled to the fund. *Munsey v. Insurance Company*, 109 Mich. 542, 67 N. W. 562, 3 D. L. N. 207.

Sec. 73. Deeds.

- (a) *Erroneous admission of deed in evidence.*

In an action for damage done by defendant's cattle on

plaintiff's premises, defendant being the owner of an adjoining farm, the introduction in evidence by plaintiff of defendant's deed, was not, if error, sufficient to require a reversal of the judgment for plaintiff. *Young v. Prentice*, 105 Mo. App. 563, 80 S. W. 10.

(b) *Erroneous admission of certified copy of trust deed.*

In an action against the second vendee of mortgaged property to recover a difference after foreclosure, the admission of evidence of a certified copy of a trust deed made in the foreclosure proceedings, without first showing that the original was lost, or not within the power of the party wishing to use the same is harmless, the fact sought to be proved in such certified copy having been established by other evidence. *Insurance Co. v. Irwin*, 67 Mo. App. 90.

(c) *Exclusion of certified copy of deed cured by date shown by county clerk.*

Where the date of a recorded deed is shown by the testimony of the county clerk, it is harmless error to exclude a certified copy of such deed, when offered to show the date of sale of the land. *McCabe v. Brown* (Tex. Civ. App.), 25 S. W. 134.

(d) *Erroneous admission of the record of a deed.*

Where plaintiff, in ejectment, established a prima facie title through conveyances from parties claiming under a deed executed by the appellant, owner of the land, who had been in possession for many years, and the title thus established is disputed in no way, unless the defendant has acquired a title by adverse possession, an erroneous admission in evidence of the record of a deed purporting to have been executed to said appellant owner, is error without prejudice. *Hohan v. Cable*, 102 Mich. 206, 60 N. W. 466.

(e) *Admission of copies of deeds.*

The admission of copies of deeds, copies of which were not filed with the papers of the case three days before the trial, as required by statute, held harmless, and not to warrant a reversal. *Hill v. Walker* (Tex. Civ. App.), 143 S. W. 687.

(f) *Exclusion of deed to land in issue, in a suit to quiet title.*

The exclusion of defendant's deed to land in issue, in a suit to quiet title therein, was harmless, where the land has been regularly assessed, sold for the non-payment of taxes, and a tax deed given, after defendant's rights had attached, was introduced. *Escondido High School Dist. of San Diego v. Escondido Seminary of Uni. of Cal.*, 130 Cal. 128, 62 P. 401.

(g) *Exclusion of deed, where copy previously admitted.*

The exclusion of a deed is not ground for reversal, where a copy is admitted, and the party had the full benefit of it. *Wiggins v. Fleishel*, 50 Texas 57.

(h) *Admission of secondary evidence as to lost deeds.*

Error in the admission of secondary evidence as to lost deeds, which were not material to the controversy, is not prejudicial. *Olcott v. Squires* (Tex. Civ. App.), 144 S. W. 314.

(i) *Erroneous evidence which agrees with the interpretation of a deed is harmless.*

Where a deed of a portion of a platted lot, describing the granted premises as extending west seventy-two feet from the northeast corner of the lot held by the grantor, in an action to quiet title, that he intends the conveyance as beginning at the lot proper, and not at the center of

the street, even if erroneous, is harmless, since the same consideration would be placed on the deed in the absence of such evidence. *Montgomery v. Hinds*, 134 Ind. 221, 33 N. E. 1100.

(j) *Evidence impeaching deed cured by its withdrawal from the jury.*

Error in admitting evidence impeaching a sheriff's deed is harmless, where it was withdrawn from the consideration of the jury. *Ketcham v. Willcox*, 5 Kan. App. 881, 48 P. 446.

(k) *Admission of ownership cured refusal to admit deed.*

On the trial of a right of homestead, refusal to admit in evidence the deed of claimant, is not error where the defendant's answer admits the claimant's ownership. *Cooley v. Noyes*, 9 Kan. App. 882, 57 P. 257.

(l) *Secondary evidence to establish due execution of a deed.*

Where a deed is delivered to one authorized by the grantee to receive it, it will be presumed to be unobjectionable in form until the contrary is shown, and the admission of such secondary evidence to establish its due execution, though incompetent, is harmless, where its validity is not attacked. *Miller v. Irish Catholic Colonization Ass'n*, 36 Minn. 357, 31 N. W. 215.

(m) *Refusing in evidence deed without a seal.*

Refusing to permit one to introduce a void deed, i. e., one without a seal, was harmless error. *Patterson v. Galliher*, 122 N. C. 511.

(n) *Admission in evidence of deed not properly stamped.*

Error was assigned to the admission in evidence of a deed not properly stamped under the internal revenue laws. The judgment appealed from was de terris, and

did not affect appellant personally, as he did not have any interest in the particular piece of land covered by the deed. Affirmed. *Lerch v. Snyder*, 112 Pa. 161.

- (o) *Admitting deed in evidence without proof of execution.*

The error in admitting a deed in evidence without proof of its execution is not ground for reversal where, under the pleading, the evidence of its introduction was immaterial and unnecessary to the proper disposition of the case. *Matthew v. Lindsay*, 20 Fla. 962.

- (p) *Deeds offered in support of limitation of five years excluded, where there was no possession to put statute in operation.*

The exclusion of deeds offered in support of limitation of five years is harmless, where there was no possession to put the statute of limitations in motion. *Bayne v. Denny*, 21 Tex. Civ. App. 435.

- (q) *Overruling claim that burden was on defendant, in issue whether deed to grantor's son was gift or trust for other sons.*

In an action involving the issue whether a deed to the grantor's son, was intended as a gift or in trust for other sons, any error in overruling the plaintiff's claim that the burden was on defendants to establish the fairness of the transaction, was harmless, where the record shows that defendants undertook that burden, and that the evidence fully satisfied the court that the transaction was fair. *Mooney v. Mooney*, 80 Conn. 446, 68 A. 985.

- (r) *Exclusion of testimony, that when she handed deed to her husband, she instructed to deliver it to a third person.*

In a suit to establish a lost deed alleged to have been

executed by defendant and handed to her then husband, since deceased, where the deed was treated by defendant as delivered, and she testified that she never authorized its delivery, but knew what her husband did with it, never asked him for the deed, though she learned that the grantee had it, of which she did not complain, was not prejudiced by the exclusion of her offered testimony, that when she handed the deed to her husband, she instructed him, in the absence of the grantee, not to deliver it to him, but to a third person. *Thomas v. Scott*, 221 Mo. 271, 119 S. W. 1098.

(s) *Admitting testimony of consideration paid for a deed.*

Any error in admitting testimony on the consideration paid for a deed was harmless, where the deed was over thirty years old and came from proper custody, since it proved its own execution and the consideration. *Wright v. Giles* (Tex. Civ. App.), 129 S. W. 1163.

(t) *Admitting in evidence deed not properly attested.*

Where the verdict is amply supported by other evidence, error in admitting a deed not properly attested is not ground for reversal. *Foreman v. Pelham*, 8 Ga. App. 822, 70 S. E. 158.

(u) *Admitting in evidence copy of copy of "expediente" issued to the original grantee.*

Error in admitting in evidence, in trespass to try title, a copy of a copy of the "expediente" issued to the original grantee of a tract from the Spanish Crown, held harmless to plaintiffs. *Sullivan v. Fant* (Tex. Civ. App.), 160 S. W. 612.

(v) *Sustaining objection to question as to plaintiffs intention in executing deed, cured by his fully explaining his reasons therefor.*

Where both before and after the court erroneously

sustained an objection to a question as to plaintiff's intention in executing a deed, he fully explained his reasons for executing it, the error was cured, and a new trial should not be granted on that ground. *Unter v. Milam*, 133 Cal. 601, 65 P. 1079.

(w) *Instruction that plaintiff by accepting deed from a third person recognized, beyond dispute, the title of the latter.*

Where, in an action for the possession of land, the issue was defendant's title by adverse possession, the error, if any, in an instruction that plaintiff, by accepting a deed from a third person, recognized the title of the latter, which could not be disputed, was not ground for reversal. *Love v. Turner*, 78 S. C. 513, 59 S. E. 529.

(x) *Instruction referring to "Exhibit F" as a plat, when it was a deed.*

In an action involving the location of a boundary, an instruction referring to "Exhibit F" as a plat, when, as a matter of fact, the exhibit was a deed, dedicating a street, and referring to an addition as made by trustees of the owner, who was going through bankruptcy at the time, and the plat was made by his trustees, was not prejudicial because of the inaccuracies. *Rehfuss v. Hill*, 243 Ill. 140, 90 N. E. 187.

(y) *In action for the cancellation of a deed, separately charging as to each ground.*

In an action for the cancellation of a deed, on the ground that the maker was incompetent to contract, and that undue influence was exercised in its procurement, it was not reversible error to charge separately as to each ground, and although the judge dealt with each separately, and, in charging as to one, used expressions which, taken alone, might have indicated that the jury

should find for plaintiff or defendant, according as they should determine that issue, yet, when the court charged in regard to each ground as affecting the validity of the deed, and from the entire charge it does not appear probable that any harm was done to the excepting party, no reversal will result. *Jeter v. Jones* (Ga. Sup.), 68 S. E. 787.

(z) *In action to set aside deed and recover money paid, instruction requiring jury to find, in order to recover, that plaintiff was insane at the time.*

Where the evidence, in an action by an executor to set aside a deed made by his deceased and to recover money obtained on a check given by the deceased or real estate, if any, purchased with the proceeds, on the ground of the deceased's insanity at the time of the making of the deed and check had no tendency to show that he was insane at one time and sane at the other, and the plaintiff, complaining of an instruction, asserted in his brief that deceased was insane for the period embracing the entire month in which the transactions occurred, an instruction requiring the jury to find that deceased was insane at the time of both transactions before the plaintiff was entitled to cancel the deed or recover the money, is harmless. *Armstrong v. Burt* (Tex. Civ. App.), 138 S. W. 172.

(a-1) *Error in date as to the execution of a deed.*

The plaintiff alleged, and the court found, that the contract for the purchase of property was made on June 11. The deed to defendant bore date June 9, and was acknowledged the next day, but the testimony showed that the contract was made before the deed was executed. Held, that the discrepancy in dates should have been corrected, but did not show error requiring reversal. *Thomas v. Jamison*, 77 Cal. 94, 19 P. 177.

(b-1) *Though patent under which plaintiff claimed conveyed an absolute title, still case decided in favor of defendant.*

In ejectment, the court found that a patent under which plaintiff claimed conveyed an absolute title, but also found that the matters in issue were formerly adjudicated in defendant's favor, and rendered a judgment for defendant. Held, that the finding as to the effect of the patent did not injure defendant. *McCormick v. Sutton*, 78 Cal. 245, 20 P. 543.

(c-1) *Proper cancellation of a deed on a cross-bill.*

Where a tract of land is the subject of judicial dispute between the parties to a bill filed to cancel a deed of the defendant to said land as a cloud on complainant's title, and the complainant shows no valid documentary title, nor title by adverse possession, and where the defendant files a cross-bill praying a cancellation of a deed to said land held by complainant, which is insufficient in itself to show title in complainant, but which has, for a number of years, been made the basis for annoyance and litigation, a decree granting the prayer of the cross-bill will not be reversed on appeal. *Baltzell v. McKinnon*, 57 Fla. 355.

(d-1) *Foreclosure of trust deed securing notes void for usury.*

A trust deed was given to secure notes which were void for usury, and thereafter the mortgagor conveyed the premises, under an agreement that the grantee should pay all legal liens. In a suit to foreclose the grantee filed no answer, and no judgment was rendered against him, and judgment went for plaintiff for the debt, minus the interest, and for foreclosure, and plaintiff appealed. Held, that plaintiff had no right to complain, and, as the mort-

gagor did not complain, the judgment would be affirmed. *Ward v. Blythe*, 91 Ark. 208, 122 S. W. 508.

Sec. 74. Depositions.

- (a) *Admission of deposition, where envelope was broken and opened in absence of defendant and without notice.*

The admission in evidence of a deposition, where the envelope containing it was broken and opened in the absence of defendant and without notice, was a mere irregularity not constituting reversible error, where it did not appear that there was any reason to suspect that it had been changed from what it was when signed and sworn to. *Jackson v. Insurance Co.* (Wash. Sup.), 88 P. 127.

- (b) *Depositions containing incompetent proof.*

If a deposition contains no competent proof favorable to the party who seeks to have it read to the jury, he is not injured by the denial of his abstract right to have the deposition, while it remains on file, treated as testimony in the case. *Wallace v. Leber*, 69 N. J. L. 312, 55 A. 475.

- (c) *Deposition improperly admitted cured by corroboration.*

A judgment will not be reversed because a deposition was improperly admitted, where the witnesses for the objecting party corroborated the testimony contained in the deposition. *Bank v. Flanagan*, 129 Mo. 178, 31 S. W. 773; *Ferrell v. Insurance Co.*, 66 Mo. App. 153.

- (d) *Admission of deposition of plaintiff to prove a note.*

Though it is unnecessary to prove plaintiff's title to the note sued on, where it was admitted by the pleadings, the admission of a deposition by plaintiff as to this

matter affords no ground for reversing the judgment. *Kinley v. Burd*, 9 Mo. App. 359.

(e) *Admission of depositions not prejudicial to intervenors.*

Where, and pending the taking of certain depositions in an action to quiet title, new parties were allowed to intervene as parties defendant, the admission of the depositions was not prejudicial to the intervenors, where ample opportunity was given them at the time the depositions were offered to take further testimony to meet the effect of the depositions, and, notwithstanding such offer, they proceeded to try, and made no effort to procure further testimony. *Kosmerl v. Mueller* (Minn. Sup.), 97 N. W. 660.

(f) *Admitting deposition when party was in court.*

Where the president of a bank, whose deposition was taken in another action, testifies, without objection, that the deposition is correct, and he is examined at length in court, error in the admission of the deposition, while the president was in court, was harmless. *Martin, J.*, dissenting, *Bank v. Marshall*, 56 Kan. 441, 43 P. 774; *R. Co. v. Prouty*, 55 Kan. 505, 40 P. 909.

(g) *Admitting an irregular deposition.*

Any error in admitting an irregular deposition was harmless, there being otherwise complete documentary proof of plaintiff's case, and no evidence of a defense. *Seneca Co. v. Crenshaw*, 89 S. C. 470, 71 S. E. 1081.

(h) *Admitting an irregularly taken deposition.*

A judgment will not be reversed because an irregularly taken deposition was read at the trial, if the verdict is sustained by competent evidence. *Wattles v. Moss*, 46 Mich. 52, 8 N. W. 567.

- (i) *Permitting a deposition to be read when witness was in court.*

Permitting the deposition of a witness to be read when the witness is actually in court, and his presence is known, is not prejudicial error, where he is subsequently called by the objecting party, and gives fully his explanation of the deposition, and his testimony as to the subject to which it related. Judgm't, 112 F. 402, 50 C. C. A. 230, affm'd, R. Co. v. Watson (Texas), 190 U. S. 287, 47 L. ed. 1057.

- (j) *Erroneously overruling objection to deposition.*

Where the witness making the deposition did not testify to anything material to the issues in the case, there was no prejudicial error in overruling the objection to his deposition. Roe v. Bank, 167 Mo. 406, 67 S. W. 303.

- (k) *Exclusion of deposition when all matters therein are in the answer, that being evidence.*

Exclusion of deposition was harmless when all the matters therein were in the answer, that being evidence. Smith v. Smith (Va. Sup.), 24 S. E. 280.

- (l) *Deposition excluded, the reading of which would not have altered the result.*

The exclusion of a deposition is not reversible error, where the reading of it would not have altered the result. Watkins v. Wortman, 19 W. Va. 78.

- (m) *Refusal to admit depositions taken in another proceeding.*

In ejectment, a witness having become incompetent by reason of the death of the defendant, the court below erroneously refused to admit his deposition taken in an equity proceeding concerning the same transaction when the parties were alive. The supreme court, on examining

the deposition, found it to be entirely immaterial, and such as could not affect the result. Judgment of non-suit affirmed. *Galbraith v. Zimmerman*, 100 Pa. St. 374.

(n) *Erroneous but harmless exclusion of deposition.*

In an action by a city against the owners of a building adjacent to a street, to recover a sum paid to discharge a judgment obtained against it for injuries to a person caused by an obstruction placed in the street by persons who had contracted to build a stone sidewalk for defendants, it was harmless error to exclude a deposition of a person then deceased, taken in the first cause, tending to prove that the witness who had the contract for the erection of the building volunteered to look after the construction of the sidewalk. *City of Independence v. Slack*, 134 Mo. 66, 34 S. W. 1094; *St. Louis Union Trust Co. v. Merritt (Mo.)*, 139 S. W. 24; *Whittaker v. Voorhees*, 38 Kan. 71, 15 P. 874; *Gifford v. Amer*, 7 Kan. App. 315, 54 P. 802.

(o) *Excluding deposition cured by witness's appearance and examination.*

Error in excluding deposition cured by witness's appearance and examination. *Benjamin v. R. Co.*, 133 Mo. 274, 34 S. W. 590.

(p) *Suppression of duplicate depositions in the same action.*

Where the deposition of a witness, taken on direct and cross-interrogatories, was used in evidence, the suppression of a subsequent deposition was harmless, in the absence of a showing that the testimony in the deposition suppressed was in any material respect different from the testimony contained in the deposition used. *Bank v. Thomas (Tex. Civ. App.)*, 118 S. W. 221.

(q) *Rejection of deposition on ground of interest.*

Action against B, on bonds purporting to have been executed by B and O jointly. Plea, non est factum. The deposition of C was offered in evidence, but was erroneously rejected by the court on the ground of interest. The deposition did not deny the execution by B, admitted that the signature on the bonds, purporting to be that of C was in handwriting similar to C's. Plaintiff recovered judgment and B took a writ of error assigning the rejection of the deposition. Held that, as the testimony did not support the plea, its rejection was not assignable as error. *Ely v. Hager*, 3 Pa. 154; *Hill v. Meyers*, 43 Pa. 170.

(r) *Exclusion of interrogatories in deposition, when deponent answers he can not tell, but presumes the facts to exist.*

The exclusion of interrogatories in a deposition is harmless, when deponent answers he can not tell positively, but presumes that a certain state of facts exists. *Hovey v. Chase*, 52 Me. 304, 83 Am. Dec. 514.

(s) *On objection to deposition not filed one clear day before trial, remark of court, "You are not going to get that advantage, I can tell you that."*

Where, on objection to deposition not filed one clear day before the trial the court said, "You are not going to get that advantage; I can tell you that," the case will not be reversed where no material prejudice was shown. *Kepley v. Dingman* (Okl. Sup.), 130 P. 284.

(t) *Refusal to charge that depositions were entitled to weigh the same as testimony given in open court.*

The refusal to charge the requirement of Revised Statutes 1874, chap. 51, sec. 34, that the jury should give the same consideration to depositions in evidence as they

would have given to the testimony if given in open court, was not reversible error, where the evidence contained in such depositions did not materially change the facts shown by other testimony. *Coburn v. R. Co.*, 243 Ill. 448, 90 N. E. 741.

(u) *Instruction relating to deposition for plaintiff, not offered by him nor allowed to be introduced by defendant.*

Where a deposition, taken at plaintiff's request, was not offered by him nor allowed to be introduced by the defendant, and the court instructed the jury as to how they should consider it and the assertion made by counsel as to its contents and illustrative of the position in which the plaintiff might be placed with reference to some facts testified to, if the deposition were used, was not reversible error. *Lee v. Follensby* (Vt. Sup.), 85 A. 915.

(v) *Decree not reversed for an informality in the taking of depositions.*

Under Code 1906, sec. 4035, a decree will not be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, where it appears that there has been a full and fair hearing upon the merits, and substantial justice has been done. *Towner v. Towner*, 65 W. Va. 476, 64 S. E. 732.

Sec. 75. Electricity.

(a) *Improper question as to charging of electric wires.*

In an action for injuries by a live electric wire, defendant was not prejudiced by the question asked of its foreman, on cross-examination, as to whether it was not common knowledge among defendant's employees that defendant's span wires were charged, where it did not appear that the witness admitted such fact. *Warren v.*

City Electric Ry. Co., 141 Mich. 298, 104 N. W. 613, 12 D. L. N. 415.

- (b) *Misstatement in an instruction that plaintiff alleged that electricity was conveyed along the streets of the city.*

Where a petition alleged that plaintiff had sustained injuries by coming in contact with a live wire used by defendant to convey electricity over and across plaintiff's premises, and had fallen upon plaintiff's gate, at which point the injury occurred, a misstatement in an instruction that plaintiff alleged that electricity was conveyed along the streets of the city was immaterial. *Houston Lighting & Power Co. v. Hooper* (Tex. Civ. App.), 102 S. W. 133.

- (c) *Although petition alleged jerking of telephone wires by other servants, as well as defect, as cause of lineman's injuries, court submitted latter ground only.*

Where, although the petition alleged the unnecessary jerking of telephone wires by other servants, as well as defective brackets, as a cause of a lineman's injuries, the court only submitted the latter ground of negligence, it was immaterial that the servants who jerked the wires, as alleged, were fellow-servants. *Eastern Ky. Home Telephone Co. v. Mellon* (Ky. Ct. App.), 116 S. W. 709.

- (d) *Leaving to jury the question whether the electric company had exercised due care in insulating its wires.*

In an action against an electric light company for causing the death of a workman on another line, it was not prejudicial to the company to leave to the jury the question of insulation of its wires, there being evidence to show that such insulation was insufficient. *Knowlton v.*

Des Moines Edison Light Co., 117 Iowa 451, 90 N. W. 818.

Sec. 76. Evidence admitted generally.

- (a) *In action for the death of a coal miner, evidence that pillar drawing was the most dangerous work in a mine.*

In an action for the death of a coal miner by the caving in, after the attempted drawing of a pillar, defendant was not prejudiced by the admission of evidence that pillar drawing was the most dangerous work in a mine. *Cox v. Wilkeson Coal & Coke Co.* (Wash. Sup.), 112 P. 231.

- (b) *Admission of evidence not strictly in rebuttal.*

The admission of evidence in rebuttal, which is not strictly rebuttal in its nature, is harmless. *Holland v. R. Co.*, 157 Mo. App. 476, 137 S. W. 995.

- (c) *Admission of oral testimony that term "special tax" covered assessment.*

Where, in an action by a lessor to recover from his lessee the amount paid as a street widening assessment on the leased property, the court properly found, as a matter of law, that the covenants in the lease that the lessee should pay all special taxes levied against the property, covered an assessment for the widening of the street, the admission of oral testimony to prove that the term "special tax" covered such assessment was a harmless error. *Pleadwell v. Missouri Glass Co.*, 151 Mo. App. 51, 131 S. W. 941.

- (d) *Evidence for special purpose and jury instructed as to limited application.*

Where evidence is received for a special purpose only, and the court charges the jury as to the limit of consid-

eration which is to be given to it, and it is evident from the amount of the verdict that such instructions have been followed, the judgment will not be reversed on the ground that such evidence was, in all respects, incompetent. *Clark v. City of Rochester*, 43 Hun (N. Y.) 271, 5 State Rep. 556, 26 Weekly Dig. 212.

(e) *Plaintiff permitted to prove the reasonable value of services under a contract.*

In an action on a contract, it was not reversible error to allow the plaintiff to prove the reasonable value of the service performed under the contract, the instructions limiting plaintiff's recovery to the contract. *Walker v. Guthrie*, 102 Mo. App. 420, 76 S. W. 675.

(f) *Testimony of the financial ability of the alleged purchaser.*

On an issue of ownership of property levied on under execution testimony as to the ability of the alleged purchaser to purchase the same, while unnecessary, in the absence of an attempt to impeach such purchaser's ability to buy, was not prejudicial. State to the use of *Gannett v. Johnson*, 1 Mo. App. 219.

(g) *Permitting plaintiff in rebuttal to repeat testimony in chief.*

After defendant had rested plaintiff was recalled as a witness in rebuttal and permitted to repeat a portion of the testimony given by her on her examination in chief. Held, that though this was improper, the court can not see that it prejudiced the substantial rights of defendant, such repetition adding nothing to the probative force of the evidence. *Dorsey v. R. Co.*, 83 Mo. App. 528.

(h) *Not error to permit a witness to state the condition of a guard the day after cattle were killed.*

Where it was subsequently proved that a cattleguard

over which cattle killed by defendant's railway passed, was practically in the same condition the day after the cattle were killed as when the cattle passed over, it was not error to permit witnesses to state the condition of the guard the day after the cattle were killed, without first proving that its condition was the same as when the cattle passed over it. *John v. R. Co.*, 135 Mich. 353, 97 N. W. 760, 10 D. L. N. 801.

(i) *In an action for loss of profits from shutting of mill, evidence of amount invested in the plant.*

The error, if any, in admitting evidence, in an action for loss of profits from the shutting down of plaintiff's mill, in consequence of defendant's negligence, of the amount of money plaintiff had invested in its plant, was harmless. *Michigan Paper Co. v. Kalamazoo Valley Electric Co.*, 141 Mich. 48, 12 D. L. N. 342, 104 N. W. 387.

(j) *Affidavit of amount due received in evidence.*

Where evidence proving the amount due on an open account by the admissions of the debtor, an affidavit of the amount due made and served by reason of How. Statutes, sec. 7535, was received in evidence against the objection of the defendant, the reception of such evidence, even if inadmissible, is non-prejudicial error. *Bjorkquest v. Wagar*, 83 Mich. 226, 47 N. W. 235.

(k) *Admission in evidence of statements of a deceased husband to his wife regarding former marriage and its dissolution.*

Where certain evidence is not at first sufficient to establish the validity of a marriage, the admission in evidence of statements of the deceased husband to his wife regarding the former marriage by him, and its dissolu-

tion, if error, is harmless. *Pittinger v. Pittinger*, 28 Col. 308, 64 P. 190.

(l) *Interrogatory by court to a witness. "State the fact as to where you looked."*

Plaintiff, as witness, being asked a leading question, which was objected to, the court, without ruling on the objection, said, "State the fact as to where you looked." Defendant excepted and plaintiff answered the court's interrogatory. Held, there was no error of which defendant could complain, the court's interrogatory not having been objected to or subject to objection, and it being a rare case it will not be reversed because of the asking of a leading question which is not answered. *Dow v. R. Co.* (Iowa Sup.), 126 N. W. 918.

(m) *Testimony as to mental anguish suffered through failure to deliver telegram.*

In an action for failure to deliver a telegram asking that the sender's sister come at once, because the sender was sick, in which plaintiff testified that he suffered mental anguish because the sister did not come; that he also stated, in his answer, that it affected him, because he did not know what was the matter with his sister, would not be held error, since the objection was too technical and could not have prejudiced defendant. *Shaw v. Western Union Tel. Co.*, 151 N. C. 638, 66 S. E. 668.

(n) *In action for personal injuries, testimony that plaintiff did not show letter of recommendation before he was employed.*

In an action for personal injuries testimony of a witness, who was asked whether plaintiff showed certain letters of recommendation to him before witness employed him, that he did not, that it was customary to ask

for letters of recommendation when a man seeks employment, was immaterial, and its admission did not injure defendant. *Freeman v. Vetter* (Tex. Civ. App.), 130 S. W. 190.

(o) *In action for injuries, admission of remark of engineer, that he could whip the man who said he did not give "the go-ahead signal."*

In an action for injuries caused by defendant's engineer moving a loaded bucket, which he was hoisting from an excavation horizontally before it was high enough, the admission of evidence that the engineer said, immediately after the accident, that he could whip the man who said he had not given "the go-ahead signal," and evidence that there was some excitement at the time of the accident, was not prejudicial to defendant. *T. B. Jones & Co. v. Pelly* (Ky. Ct. App.), 128 S. W. 305.

(p) *Where defendant refused to receive and pay for goods ordered, evidence that the price of the goods had declined.*

Where defendant refused to receive and pay for goods which the plaintiff claimed defendant had ordered, denying the validity of the order, because not registered as required by its rules, which were known to plaintiff, but plaintiff claimed that such rule had been waived, the reception of evidence that the market price of the goods had declined before defendant refused to accept them, even if not relevant to the issue of waiver, was not prejudicial error. *Gimbel Bros. v. Gloversville Silk Mills* (New York), 176 F. 219, 99 C. C. A. 573.

(q) *Evidence of market value at place other than place of delivery.*

In an action by breach by the buyer of a contract of

sale, where no testimony of the market value of the goods at the place of delivery was introduced, and plaintiff recovered but nominal damages, the admission of testimony of the market value at a place other than the place of delivery was not prejudicial to defendant. *Parline & Oreboff Co. v. Boatman*, 89 Mo. App. 43.

(r) *In action against town for death from electric wires, evidence that wires had been wrapped and properly insulated after the killing.*

Where defendant was negligent primarily in allowing its electric wires, carrying a high voltage of electricity, to sag down across a path where people were accustomed to move, and such negligence was the proximate cause of the death of decedent, who caught hold of the wire while passing under it, defendant was not prejudiced by evidence that the wire had been wrapped and properly insulated after the killing. *Harrington v. Com'rs of Town of Wadesboro*, 153 N. C. 437, 69 S. E. 399.

(s) *In suit against telegraph company for delay in transmitting message, testimony that it took but eight minutes between other points equi-distant.*

Where a telegraph company delayed the transmission of the message for more than three hours, and the following day transmitted a message between the same points in less than one hour, the admission of testimony that it only took eight minutes to receive a response from messages sent between two other points which were on the same line, and nearly as far apart, was harmless, where this fact was uncontroverted, and the delay of the first message was not explained. *W. U. Tel. Co. v. Landry* (Tex. Civ. App.), 134 S. W. 848.

- (t) *In action for injuries from automobile, plaintiff stating his reasons for being certain that he stopped and looked for passing vehicles, before attempting to cross the street.*

Where plaintiff, in an action for injuries caused by an automobile driven by defendant, was improperly permitted to state, as his reasons for being certain that he stopped and looked for passing vehicles before attempting to cross the street, that his son, while crossing the street a short time before had met with an accident, and that this was in his mind when he started to cross the street; the statement could not have misled the jury, and hence, was not prejudicial. *Segerstrom v. Lawrence* (Wash. Sup.), 116 P. 876.

- (u) *In action on a building contract, permitting architect to testify to deduction for defective or omitted work.*

Where, in an action on a building contract for balance due thereunder, the owner admitted that the certificate of the architect was final, and the extent of the defective work and the cost of remedying the same, and no claim was made for a recovery in excess of that allowed by the architect, and the court found that the allowance by the architect for defective work and the cost of remedying the same was reasonable, the error in permitting the architect to testify to the deductions for defective work or omitted work was not prejudicial. *John V. Schaeffer, Jr., & Co. v. Ely*, 84 Conn. 501, 80 A. 775.

- (v) *In action against tunnel contractors, permitting witness to testify that commissioner refused to recall watchman to guard against loss of life, etc.*

In an action by city water commissioner against a tunnel contractor for reimbursement for expenses of protecting the water main pending the construction of the

tunnel, it was not reversible error to permit one of the commissioners to testify that the board refused to recall a watchman, over the contractor's protest, "to guard against an appalling loss of life and the danger of a conflagration, that were imminent in case there was a break in the pipe." *Bd. of Water Commissioners v. Butler Bros. Const. Co.* (Mich. Sup.), 133 N. W. 1006.

(w) *Admission of evidence on benefit certificate, that about twenty-five percent of the women in the United States have trouble in the abdominal front.*

In an action on a benefit certificate, the defense being that deceased, a woman, died of an abdominal disease that she failed to disclose in her application, admitted the evidence that about twenty-five percent of the women of the United States have trouble down in the abdominal front, held harmless, where there was nothing to show that deceased knew that she had such disease or practiced any fraud on defendant. *Modern Brotherhood of America v. Chandler* (Tex. Civ. App.), 146 S. W. 626.

(x) *Admission of decedent's statement on returning to consciousness, "How did this happen?"*

In an action for death, the admission of decedent's statement, on returning to consciousness, after being struck by a train, "How did this happen?" was harmless error. *Atkins v. R. Co.*, 152 Mo. App. 291, 132 S. W. 1186.

(y) *Admission of evidence that deceased was able to earn \$1,000 a year.*

The admission of evidence that deceased was able to earn \$1,000 a year, if error, was harmless, where the verdict was for only \$2,000, and deceased was forty-six years of age, and left surviving him a widow and five small

children. *Bethell v. Pawnee County* (Neb. Sup.), 145 N. W. 363.

(z) *Admitting statement made by deceased soon after he fell from a ladder, "The ladder bent over."*

Any error in admitting evidence that decedent said, soon after he fell from a ladder, "The ladder bent over," was not reversible, where it was self-evident that the ladder was bent over, and that its bent condition was connected with decedent's fall. *Greener v. Gen. Electric Co.*, 138 N. Y. Supp. 273, 153 App. Div. 439.

(a-1) *Admitting evidence of the destruction of the ladder after the accident.*

In a master and servant accident case, an employee of defendant having testified that he examined the ladder after the accident and found that it was unbroken, cross-examination showing that the witness himself destroyed the ladder immediately after the accident, even if erroneous, was harmless, where the judge charged that no inference unfavorable to defendant arose out of such destruction of the ladder. *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647, 44 A. 762.

(b-1) *Cashier's statement that paper was discounted before board of directors knew of it.*

In an action by a bank against a former president and director to recover for moneys lost by his negligence in permitting the cashier to borrow on inadequate security, the cashier was asked why he did not request his loan of a full board of directors, and replied, over objections, that it was customary to discount nearly all paper before the board knew of it. Held, that as such reply was not prejudicial to defendant, any error in its admission was immaterial. *Bank v. Chatfield*, 127 Mich. 407, 86 N. W. 1015, 8 D. L. N. 419.

(c-1) *Evidence of part plaintiff took in assisting defendant to purchase certain rights.*

In an action for breach of a contract with a broker to sell goods, where the court submitted the case on the theory that plaintiff could recover only in case an oral contract had been modified and affirmed within a year; held, that defendant was not prejudiced by evidence as to the part plaintiff took nearly a year before the contract in assisting defendant to purchase certain rights. (Ohio), *Hollwey v. Schaefer Brokerage Co.*, 197 F. 689, 117 C. C. A. 83.

(d-1) *Evidence of placing bar across elevator-door after the accident.*

Where it was shown that the door in the elevator shaft was kept open, and that plaintiff fell through the same, the admission of evidence that defendants placed a bar across the door the next day is harmless error. *Marder v. Leary*, 137 Ill. 310, 26 N. E. 1093.

(e-1) *Where plaintiff's testimony of amount paid for medical attendance was uncontradicted, refusal to require jury to find specially thereon.*

When, in a suit for personal injuries, there is nothing to contradict the testimony of the plaintiff as to the amount paid for medical attendance, it is not prejudicial error to refuse to require the jury to find specially the amount allowed therefor. *Kansas City v. Bradbury*, 45 Kan. 381, 25 P. 889.

(f-1) *Reading to jury more evidence than requested.*

Where the trial court, in response to a request by the jury that certain portions of the evidence be read to them, read more evidence than was requested, but such additional evidence so read was in favor of the losing party,

he can not be said to have been prejudiced. *Smith v. Ross*, 31 App. D. C. 348.

(g-1) *Permitting witness to testify that he saw nothing in plaintiff's conduct to lead witness to think plaintiff was malingering.*

Where, in an action for personal injuries, defendant, in a cross-examination of one of the plaintiff's medical witnesses, asked a series of questions, for the purpose of showing that plaintiff was malingering, and the witness testified that he was positive, "There was some injury there," defendant was not prejudiced by erroneously permitting the witness to testify that he saw nothing in plaintiff's conduct to lead the witness to think plaintiff was malingering. *Judd v. Caledonia Tp.*, 150 Mich. 480, 114 N. W. 346, 14 D. L. N. 756.

(h-1) *Admitting evidence of plan of proposed bridge.*

In a proceeding by the board of freeholders to condemn land for an approach to a bridge, any error in the admission of evidence of the plan of the proposed bridge was not prejudicial to the board, since, in the absence of any proof on the subject, the presumption is, that the bridge will be of such a character as to do the most injury to the remaining property of the landowners. *Hadley v. Board of Chosen Freeholders*, 75 N. J. L. 197, 62 A. 1132.

(i-1) *Admitting testimony to explain terms of written contract.*

The court will not reverse a judgment for error in the admission of evidence to explain the terms of a contract, where it reaches the same conclusion in regard to the construction of the contract in disregard of such testimony. *Taylor v. Enoch Morgan's Sons Co.*, 124 N. Y. 184. 35 St. Rep. 68.

(j-1) *Testimony as to the board of family, etc., not claimed in petition.*

A sued B for wages due on a written contract of service. Nothing was provided in the contract as to the board of himself and family, and that for two horses claimed in addition by A, the court, however, admitted testimony to show the value of such board and feed. The jury brought in a verdict for the sum stipulated in the contract, with interest. Judgment affirmed. *Cornish v. Hooker*, 141 Pa. 138.

(k-1) *Admission in rebuttal of evidence necessary to plaintiff's case.*

The mere admission in rebuttal of evidence necessary to the plaintiff's case in chief, is not reversible error. (Neb.) *City of Omaha v. Omaha Water Co.*, 171 F. 647, 96 C. C. A. 419.

(l-1) *Evidence of the market value elsewhere than place of delivery.*

Admission of evidence as to the market value at other nearby points, and on recall confirming the subject of the contract, in the absence of such evidence as to the market value at the place of delivery, is not prejudicial to the interests of the surety on the bond. *Phosphate Co. v. Chemical Co.*, 14 O. C. C., n. s., 50, 22 O. C. D. 286.

(m-1) *Admission of parol evidence to contradict the record.*

In an action by a trustee in bankruptcy on the bond of a former trustee to recover a sum claimed to have been received by the former trustee and embezzled by him, where the sureties alone were served and defended, the calendar entries of a referee, not the record itself, showing that the trustee rendered an account, which was confirmed, was not a defense, where the record did not show,

nor was it alleged, whether or not the sum in dispute was shown by the account or settled, and the admission of parol evidence to contradict such record, if error, was harmless. (Ohio), *Scofield v. U. S.*, 174 F. 1, 98 C. C. A. 39.

(n-1) *Admission of evidence to show defect a flaw instead of a cut.*

Where the petition for injury from the operation of a shaft alleged that the defect causing the break was a flaw, or a hole cut therein for keying the wheel to it, and that it so weakened the shaft as to render it unsafe for persons employed to work under it, so that the important question was, whether the defect rendered it unsafe and dangerous, any error in admitting evidence to show that it was a flaw rather than a cut was harmless. *Phelps v. Conqueror Zinc & Lead Co.*, 218 Mo. 572, 117 S. W. 705.

(o-1) *Permitting surveyor to refresh his recollection from his survey.*

Permitting a surveyor, in an action of ejectment, to refresh his recollection from a copy of the minutes of his survey, is not cause for reversal, where it appears that he did not testify on his direct examination to anything that he did not remember independently of the copy. *Miller v. Shumway*, 135 Mich. 654, 98 N. W. 385, 10 D. L. N. 923.

(p-1) *Evidence of the speed at which grindstones were run in other factories.*

In an action for injury to an employee from the bursting of a grindstone, the periphery speed of which at the time was 4,355 feet per minute, though it is error to allow testimony for plaintiff as to the speed at which such stones are run in other factories, still it will be held harmless, it not being shown thereby that grindstones had

burst in the other factories, and defendant having introduced testimony that in a certain factory similar stones had been run at a speed of 4,200 feet per minute, and that no stone had been broken in that factory for ten years. *Helpenstein v. Medart*, 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294.

(q-1) *Evidence of the indigence of plaintiff.*

In an action for personal injuries, error, if any, in admitting evidence that plaintiff is without means, is harmless, where it was admitted solely in rebuttal of evidence that counsel were to have a share of any judgment recovered as their fee, and where the verdict shows that the jury did not consider it in estimating the damages. *Arndt v. Borke*, 120 Mich. 263, 79 N. W. 190, 6 D. L. N. 140.

(r-1) *In action for commissions on sale of lumber, witness estimating quantity.*

Where an action for commissions for selling logs was tried on the theory that if defendant was liable to pay commissions on all the logs specified in the contract, there were about nine million feet, and there was no real dispute as to the amount, it was not error to permit one of the plaintiffs, who had seen about seven million feet of them, and was an experienced lumberman, to state his estimate of the quantity. *Burrell v. Gates*, 112 Mich. 307, 70 N. W. 574, 4 D. L. N. 13.

(s-1) *In action for damages for assault, asking defendant whether he had been convicted before a justice.*

Where a codefendant, in an action for damages for an assault, had pleaded guilty in a criminal proceeding brought before a justice, there was no harm in asking him, on cross-examination, whether he was convicted be-

fore the justice. *Kuney v. Dutcher*, 56 Mich. 308, 22 N. W. 866.

(t-1) *Receiving testimony of the chief of police.*

Defendant called the chief of police of the city where a witness lived, in order, and the court record, to show that the witness had been convicted of certain offenses, but failing to do so, asked the chief if he had known witness for a long time, to which the chief answered that he had. Held, that the testimony of the chief that he had known witness for a long time, was not prejudicial to his credibility, where it was treated as ruled out, and in view of the further fact that the witness had been convicted of an assault and committed to the house of correction. *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588.

(u-1) *In action for injuries, evidence of the value of the services of plaintiff's wife and daughter.*

In an action against a municipal corporation for personal injuries to plaintiff's minor son from falling over a tree in the street, the admission of evidence as to the value of the services of plaintiff's wife and minor daughter in nursing the son did not injure defendant. *Blackwell v. Hill*, 76 Mo. App. 46.

(v-1) *Admission of evidence of acceptance of subcontractor's bid.*

Where, in a suit to foreclose a subcontractor's lien, there is no real dispute as to the facts, the admission in evidence of an acceptance by the owner of the subcontractor's bid is not reversible error. *McDermott v. Claas*, 104 Mo. 14, 15 S. W. 995.

(w-1) *Permitting county treasurer to read entries from his books.*

It is not prejudicial error to permit a county treasurer

who, with the records of his office, has appeared as a witness in a suit, to turn to the several entries therein and state to the court what said entries are, though the record itself would have been the best evidence. *Stevens v. Nebraska Loan & Trust Co.*, 65 Kan. 859, 70 P. 368.

(x-1) *Admitting evidence to correct erroneously suppressed defense.*

In a civil action for an assault and battery, where two sufficient defenses were set forth in defendant's answer, and the court, upon motion and demurrer, erroneously holds that one of them is insufficient, and afterwards the defendant goes to trial upon the other defense, and rightfully, and without objection, introduces all his evidence under it, which he could have introduced under the defense which was excluded; held, that no material error was committed. *Clark v. Weir*, 37 Kan. 98, 14 P. 533.

(y-1) *Non-prejudicial improper answer.*

Where it appears from all the evidence that the party complaining was not prejudiced by an improper question and answer, and where, upon the whole record, the verdict appears to be the proper disposition of the issues presented, the judgment will be affirmed. *Ry. Co. v. Esten*, 78 Ill. App. 326.

(z-1) *Error in admitting unnecessary proof.*

Where plaintiff, in an action to collect a street assessment, has made prima facie proof of the regularity of the proceedings under act of March 18, 1885, and thereafter introduces, without objection, certain parol proof, a refusal to strike this out, if error, is harmless, as such proof was unnecessary. *Manning v. Den* (Cal. Sup.), 24 P. 1092; *Bank v. Mitchell*, 48 Ill. App. 486; *Dickerson v. Hendry*, 88 Ill. 66; *Hogan v. Insurance Co.*, 81 Iowa, 321.

(a-2) *When objecting party not prejudiced propriety of question not considered.*

The propriety of a question to a witness will not be considered, where the answer shows that the objecting party can not have been prejudiced. *Jacobson v. Gunzburg*, 150 Ill. 135.

(b-2) *Wife's testimony that her husband turned his wages over to her.*

The testimony of a wife, to the effect that her husband, plaintiff in the suit against the railroad company for personal injuries, turned his wages over to her on certain occasions, introduced for the purpose of showing how much he was earning, though made when no third person competent to be a witness was present, can not be regarded as prejudicial to the railroad company, where there was no dispute about the matter, and the husband testified to the same effect. *R. Co. v. Waterworth*, 21 O. C. C. 495, 11 O. C. D. 621.

(c-2) *Testimony admissible to a certain extent under proper instructions.*

Testimony admissible for any purpose should be allowed to go to the jury under proper instructions, and it is not good ground for refusing to receive it, that it was not admissible as proof on the substantive ground of the relief sought. *R. Co. v. Mahoney*, 22 O. C. C. 469, 12 O. C. D. 366.

(d-2) *Error in admitting evidence cured by decision rejecting the part of the action to which it was applicable.*

Error in the admission of evidence is cured by a decision rejecting that part of the cause of action which the evidence was offered to prove. *Tiven v. Monahan*,

76 Cal. 131, 18 P. 144; Gillespie v. Lake, 95 Cal. 402, 24 P. 891; School Dist. No. 6 v. Ins. Co., 62 Me. 330.

(e-2) *Error in receiving improper evidence cured by court striking it out before rendering decision.*

Where, before a cause is submitted for decision, the court orders all of certain evidence stricken from the case, error, if any, in the reception of such evidence should not be considered. Banning v. Marleleau, 133 Cal. 485, 65 P. 964.

(f-2) *Improper evidence not injurious to party complaining.*

Error in admitting testimony is harmless, unless it appears to have been prejudicial to the party complaining. Graham v. Frank, 38 P. 455 (Cal. Sup.); Priest v. Union Canal Co., 6 Cal. 170.

(g-2) *Admission of evidence that party from whose negligence deceased was killed would get intoxicated.*

The admission of evidence that an employee of defendant, from whose alleged negligence deceased was killed, would get intoxicated, though not relevant, as it appeared that at the time of the accident he was not intoxicated, is not ground for reversal, as it could not have influenced the verdict. Davies v. Oceanic S. S. Co., 89 Cal. 280, 26 P. 827; so of any error in admitting or rejecting testimony not affecting the result, City of Louisville v. Muldoon, 20 Ky. L. R. 1576. 49 S. W. 791.

(h-2) *In will contest for undue influence, saying of mother that she would be willing to have her other daughters marry rich old men.*

Admission of testimony on contest by her husband for undue influence of his wife's will, giving her property to her mother, with reference to the fact that he was seventy

years old, while she was thirty years old, when they were married, her mother said she would be willing for her other daughters to marry old men as rich as he was, if error, is harmless. *Tibbetts Est., In re*, 137 Cal. 123, 69 P. 978.

(i-2) *Where written contract controlled, the admission of oral negotiations leading up to it.*

Where the written contract is placed in evidence and controls in the decision of the controversy, the admission of improper evidence as to the oral negotiations of the parties which led up to the written contract, is not ground for reversal of the judgment, it appearing that no injury resulted therefrom. *Jones v. Tallant*, 90 Cal. 386, 27 P. 305.

(j-2) *Receiving parol evidence of written contract.*

The erroneous admission of parol evidence as to a written contract was not prejudicial, where the evidence neither contradicted nor varied the terms of the contract. *Alexander v. Wade*, 106 Mo. App. 141, 80 S. W. 19.

(k-2) *Subsequent proper evidence cured earlier improper evidence.*

In an action on the case by A against B, based upon the indorsement of a note for supplying B's agent, A introduced in evidence a certified copy of a power of attorney appointing the agent, before explaining the non-production of the original. Subsequently, however, A showed that the holder of the power of attorney had left the company and was not to be found. Exceptions to the admission of the certified copy excepted to. Dismissed. *Hannay v. Stewart*, 6 Watts (Pa.) 487; *Darrington v. R. Co.*, 52 Conn. 310; *Roosevelt Hospital v. R. Co.*, 50 St. Rep. 456, 458, 21 N. Y. Supp. 205.

(l-2) *Permitting defendant to state the motives for bringing of suit against him.*

A defendant, without objection, testified concerning plaintiffs' motives in bringing suit, and then, over objection, stated his reasons why he thought the action maliciously brought. In the course of his testimony he admitted that he owed plaintiffs something and refused to pay. Held, that error in permitting him to state his reason was harmless. *Wise v. Wakefield*, 118 Cal. 107, 50 P. 310.

(m-2) *Testimony of incompetent witness not bearing on the case.*

Where the testimony of an incompetent witness has no bearing on the case, the error is not prejudicial. *R. Co. v. Geoghegan*, 13 Ky. L. R. (abst.) 144.

(n-2) *Showing sidewalk, where accident happened four years before.*

In an action against a city for injuries caused by a defective sidewalk, it was not reversible error to admit evidence showing the condition of the sidewalk, where the accident occurred four years prior thereto, and where there was abundant evidence that the sidewalk was in bad condition at the time of the accident. *City of Topeka v. High*, 6 Kan. App. 162, 51 P. 306.

(o-2) *Reception of additional evidence beyond agreed statement of facts.*

An agreed statement of facts, and payment pursuant thereof of the balance due on one branch of the case, will not render the reception of additional evidence, which puts no one to any disadvantage, reversible error. *Behrens v. Leucht*, 13 O. Dec. Repr. 864, 2 C. S. C. R. 217.

(p-2) *Overruling objection to proper question to which witness gave a negative and irrelevant answer, and then proper answer.*

The overruling of an objection to a question to which the witness answered, "I don't know," and then proceeded to state relevant facts which he did know, is not prejudicial. *Construction Co. v. Coleman*, 13 O. C. C. n. s. 47, 22 O. C. D. 242, affm'd, w. o. 84 O. S. 458.

(q-2) *Where principal fact admitted without exception, subsidiary or corroborative fact also admissible.*

Where the principal fact is given in evidence, without exception, it is not reversible error to give in evidence a subsidiary or corroborative fact. *Bank v. Inman*, 8 Ind. App. 239, 34 N. E. 21, 670.

(r-2) *Where motorman had ample time to stop the car after noticing peril, testimony as to slackening speed and time within which to stop.*

Where it appears that at the time the motorman of an electric car noticed the peril of the plaintiff he had ample time to stop the car, testimony as to slackening the speed of the car and as to the time within which it could be stopped, is not prejudicial, whether competent or incompetent. *Electric Railway v. Hunter*, 10 O. C. C. n. s. 564, 12 O. C. D. 769.

(s-2) *Subsequent evidence which cured error.*

Where the action of the court is at the time erroneous as, for instance, in admitting a written instrument without preliminary proof of the signature, yet, if subsequently evidence is such as to render the action of the court proper therein, there is no ground for reversal. *Davenport v. Cummings*, 15 Iowa 219.

(t-2) *Too great latitude given in introducing evidence.*

In an action against a city for personal injuries caused by a defective sidewalk, where greater latitude in the introduction of evidence of the condition of the sidewalk after the accident is permitted than is proper to show the condition at the time the accident happened, such error will be harmless if there is no claim that plaintiff should recover damages for any negligence occurring after the injury. *City of Abilene v. Hendricks*, 36 Kan. 196, 13 P. 121; *City of Olathe v. Mizer*, 48 Kan. 435, 29 P. 754, 30 Am. St. 308.

(u-2) *Evidence that city had appropriated money to repair highway.*

On the issue of a city's responsibility for obstructions in the highway, error in admitting evidence that the city had appropriated money for the repair of the highway was harmless, where the highway was shown to have been continuously used by the city for over twenty years. *Beaudeau v. City of Cape Girardieu*, 71 Mo. 392.

(v-2) *Admission of oral evidence to corroborate the record.*

Where the issue was, whether the judgment in a certain replevin suit was *res adjudicata* against defendant as to the title to certain bricks, and it appeared that the record in the replevin suit would have been sufficient to have justified a finding that the judgment in such suit was *res adjudicata*, defendant could not complain of the admission of oral evidence on behalf of plaintiff tending to corroborate the record. *Hunter v. McElhaney*, 48 Mo. App. 234.

(w-2) *Admission of secondary evidence without objection.*

The admission of a schedule or synopsis of the original entries made in account books, which schedule was sworn

to as correctly taken from the books, and was not challenged as incorrect, was not reversible error. *B. Roth Tool Co. v. Champ Spring Co.*, 146 Mo. App. 1, 123 S. W. 513.

Sec. 77. Evidence admitted on condition.

- (a) *Where copy of deed was admitted on condition, error was cured by subsequent filing of proof thereof, showing loss.*

Where a copy of a deed was admitted on condition that proper proof of loss be supplied, error in so doing is cured by subsequently filing proof of loss. *Kenniff v. Caulfield*, 140 Cal. 47, 73 P. 803.

Sec. 78. Evidence admitted out of correct order.

- (a) *Admitting evidence out of correct order.*

The admission of evidence out of order is not ground for reversal. *Stotts v. Bates*, 73 Ill. App. 640; *Cook Mfg. Co. v. Randall*, 62 Iowa 244; *Marysville Mercantile Co. v. Insurance Co.*, 21 Ida. 377, 121 P. 1026; *City of Logansport v. Newby* (Ind. App.), 98 N. E. 4; *R. Co. v. White's Adm'x*, 147 Ky. 15, 143 S. W. 1046; *Roberts v. Pepple*, 55 Mich. 367, 21 N. W. 319; *Cox v. Polk*, 139 Mo. App. 260, 123 S. W. 102; *Holland v. R. Co.* (Mo. App.), 137 S. W. 995; *Zilke v. Johnson* (N. D. Sup.), 132 N. W. 640.

- (b) *Where plaintiff failed to establish the main issue, error as to the order in which the evidence was introduced was harmless.*

In a trial to the court, where plaintiff failed to establish the main issue in his case, error by the court in regard to the order in which the evidence was introduced was harmless. *Casseleigh v. Green*, 12 Col. App. 515, 56 P. 189.

Sec. 79. Evidence as to the meaning of writing, as to terms of written contracts, and of contents of written instruments.

(a) *Evidence as to the meaning of writing.*

Admission of evidence as to the meaning of writing was harmless where it was the correct interpretation. *Learned & Letcher Lumber Co. v. Fowler*, 109 Ala. 169, 19 S. 396; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

(b) *Admitting proof of the terms of a written contract.*

In an action on the contract, it is harmless error to admit parol proof of its terms after it appeared that the contract was in writing; where the court afterward submits the case to the jury, on the theory that the written contract given in evidence on the trial so determined the rights of the parties, especially if there is no material difference between the parol contract as proved and the written contract as considered by the court. *Hill v. Chipman*, 59 Wis. 211, 18 N. W. 160.

(c) *Admitting evidence of the contents of a written instrument.*

Error, if any, in admitting evidence of the contents of a written contract reciting that F was authorized to purchase certain land in controversy for a corporation, was not prejudicial, where such authority was established by other testimony and was uncontroverted. *Pope v. Ansley Realty Co.* (Tex. Civ. App.), 135 S. W. 1103.

Sec. 80. Evidence excluded and afterwards admitted.

(a) *Excluded evidence afterwards admitted.*

Error in excluding evidence is without injury if the party objecting afterwards admits the fact. *Foxworth v. Brown*, 120 Ala. 59, 24 S. 1.

Sec. 81. Evidence of special or additional services.*(a) Admission of evidence of special services.*

Where a demand for the recovery for extra services is joined in the same paragraph of the complaint for particular services rendered under a contract, the admission of evidence of such special services is harmless, where the court or jury trying the case, specifically refused any allowance for them. *Killian v. Eigenmann*, 57 Ind. 480.

(b) Evidence of performance of additional services.

Evidence that plaintiff performed services in addition to the obligation alleged in the complaint to have been assumed by her, and that such services were a part of the consideration of the contract, though not so alleged, is not prejudicial to defendant, where the proof of the performance of the agreement alleged is sufficient, and plaintiff would be entitled to recover on the cause alleged. *Grimbley v. Harrold*, 125 Cal. 24, 73 Am. St. Rep. 19, 57 P. 558.

Sec. 82. Evidence received and afterwards rejected.*(a) Rejection of evidence which had been already introduced.*

Defendant was not prejudiced by the rejection of testimony which had been once introduced, and was again offered to the jury. *Smith v. Howard*, 28 Iowa 51.

Sec. 83. Evidence tending to inflame the feelings of the jury.*(a) Evidence offered to inflame the feelings of the jury cured by being stricken from the record.*

Defendant can not claim a reversal because of evidence offered to inflame the feelings of the jury, as contended by him, where an objection was sustained thereto, and

it was ordered stricken from the record. *Jennings v. Appleman* (Mo. App.), 139 S. W. 817.

Sec. 84. Excluded evidence.

- (a) *Excluding question to expert which assumes what had not been proved.*

Exclusion of a question to an expert, which assumes what has not been proved, is not error. *Detwiler v. Toledo*, 13 O. C. C. 579, 6 O. C. D. 300, *affn'd*, w. o. 56 O. S. 772; so excluding immaterial when essential fact is admitted, *Bowman v. Hartman*, 6 O. C. C. n. s. 264, 17 O. C. D. 309.

- (b) *Where improperly excluded evidence tended only to prove what was assumed and charged by the court.*

Where evidence was improperly excluded, but tended only to prove what was assumed and charged by the court, its exclusion is not ground for reversing the judgment. *Fitch v. Chapman*, 10 Conn. 8; *Thompson v. Corris*, 50 N. C. 15 (5 Jones Law), 151; *Evans v. See*, 23 Pa. St. (11 Harris) 88.

- (c) *Exclusion of evidence on damages when verdict is for defendant.*

The exclusion of evidence bearing only on the question of damages is not ground of error, where the verdict is for the defendant, and that question is not reached. *Stevens v. Brown*, 14 Ill. App. 173.

- (d) *Exclusion immaterial when verdict established the fact.*

Where, in an action for wrongful death by negligence, the jury returned a verdict for plaintiff, a reviewing court will not consider an assignment of error based upon the exclusion of testimony showing defendant to have been guilty of negligence. The exclusion of such testi-

mony was not prejudicial since the verdict established the negligence of defendant. *Gentile v. R. Co.*, 4 O. N. P. 9; 6 O. D. n. p. 111; *Hunnicut v. R. Co.*, 85 Ga. 195, 11 S. E. 580; *Gilfillan v. Mawhinney*, 149 Mass. 264; *State ex rel. v. Hines* (Mo. App.), 128 S. W. 248; *Taylor v. Coleman*, 20 Tex. 772.

(e) *Striking out evidence too indefinite for consideration.*

The striking out of evidence that is too indefinite to be considered, if error, is harmless. *Overall v. Bezeau*, 37 Mich. 506.

(f) *Exclusion of evidence immaterial unless it appears there was insufficient ground for exclusion.*

The exclusion of evidence is not ground for reversal, unless it appears there was not sufficient ground for such exclusion. *Adams v. Weaver*, 117 Cal. 49, 48 P. 972.

(g) *Where the court of its own motion excludes evidence, it will be sustained if for any reason the same is inadmissible.*

Where the court excludes evidence of its own motion, the rule will be sustained if, for any reason the evidence is inadmissible. Where court excludes evidence of its own motion, the ruling will be sustained if, for any reason, the evidence is inadmissible. *Davey v. Southern Pacific Co.*, 116 Cal. 330, 48 P. 117.

(h) *Objectionable answer cured by striking out and charging jury to disregard it.*

Where a question is put, and under objection answered, and afterwards, on motion of the objecting party, the answer is stricken out, and the charge to the jury is such as to exclude from their consideration the subject matter of such question and answer, whether the exclusion of such evidence was proper or not, plaintiff in error has no

ground of complaint. *Hill v. Robinson*, 23 Mich. 24; *McNaughton v. Smith*, 136 Mich. 368, 99 N. W. 382, 11 D. L. N. 81; *Murray v. R. Co.*, 225 Mo. 272, 125 S. W. 751.

(i) *Error in sustaining objection to answer harmless, the question having been previously answered.*

On cross-examination of plaintiff, who had fallen into an excavation from the sidewalk, he was asked if he could not have walked on the outside so as to have avoided the accident, to which he gave an affirmative answer, whereupon his counsel objected to the question saying, that "a pedestrian does not have to walk on the outside." Held, that the error in sustaining such objection was harmless, plaintiff having previously answered substantially the same question without objection. *Cannon v. Lewis*, 18 Mont. 572.

(j) *Improper answer to proper question cured by striking out and admonishing witness.*

Where the question called for proper testimony, but the witness gave hearsay or conjecture, the court, by striking out the hearsay, and stating to the witness that he should not answer what he supposed adequately dealt with the matter. *Ide v. R. Co.*, 83 Vt. 66. 74 A. 401.

(k) *Excluding evidence under one count where judgment may be sustained on another.*

Error in excluding the evidence under one count is without prejudice, where the judgment for plaintiff may be sustained on another count. *Amador Gold Mine v. Amala Gold Mine*, 114 Cal. 346, 46 P. 80.

(l) *Exclusion of evidence which different construction of statute on appeal renders immaterial.*

Error in the exclusion of evidence is harmless, where

a different construction of a statute on appeal renders the evidence immaterial. *Smith v. Hazard*, 110 Cal. 145, 42 P. 465.

- (m) *Exclusion of evidence that defendant had paid part of joint note where proof showed that plaintiff inferentially knew thereof.*

Exclusion of evidence that defendant had paid part of the joint note in favor of plaintiff and another, and assigned by plaintiff's co-payee without her authority, was harmless, where the evidence showed that plaintiff inferentially knew of such payment. *Moulton v. Harris*, 94 Cal. 420, 29 P. 706.

- (n) *Identified document which the court refused to allow to go to the jury, and is not offered or read in evidence.*

Refusal of the court to allow the inspection of ordinance shown to the plaintiff as a witness, and identified as being in the handwriting of the defendant, and marked by the reporter for identification until they were offered in evidence, can not prejudice the defendant where it is not afterward offered or read in evidence, since it could not be read to the jury after the testimony was excluded, without the defendant's recalling the plaintiff for cross-examination. *Stockwell v. Insurance Co.*, 140 Cal. 198, 98 Am. St. Rep. 25, 73 P. 833; *Clark v. Fast*, 128 Cal. 422, 61 P. 72.

- (o) *Ruling out explanatory answer to question, where explanation had already been given.*

The ruling out of an explanatory answer to a question was not prejudicial where an explanation had been previously given. *Calkins v. R. Co.*, 92 Iowa 714, 61 N. W. 423.

- (p) *Sustaining objection to plaintiff's introducing in evidence defendant's original answer.*

The action of the trial court in sustaining an objection to the introduction in evidence by plaintiff of the original answer of the defendant, who is relying on an amended pleading, if erroneous, is error without prejudice where, with the answer in evidence, no different conclusion could have been reached. *McGavock v. City of Omaha*, 40 Neb. 64, 58 N. W. 543.

- (q) *Rejection of evidence of water commissioners that in previous year they had paid no member a salary.*

In an action by a board of water commissioners of a village to recover an assessment against the property of defendant, under sec. 230 of the village law, the rejection of evidence offered by defendant of a report of the water commissioners showing that in the preceding year they had paid no one of their own members a salary for acting as superintendent, is not reversible error, nothing appearing to show that they contemplated a similar action for the ensuing year. *Village of Caneseraga v. Green*, 88 N. Y. Supp. 539.

- (r) *Exclusion of oral evidence that defendant was not personally served with summons.*

Where plaintiff's documentary evidence showed that defendants, in an action against whom it had been garnished in another state, were not served with personal process therein, the exclusion of oral evidence that defendants had not been personally served in that state was harmless. *Western Assurance Co. v. Walden* (Mo. Sup.), 141 S. W. 595.

- (s) *Striking out of competent evidence was immaterial.*

Where, in an action of ejectment the testimony all

tended to prove, and the court, in submitting the matter to the jury, charged that the defendant was in possession of the strip of land in controversy for more than fifteen years, title to which he claimed by adverse possession, while plaintiff claimed by grant from a person since deceased; striking out testimony of defendant's father and grantor respecting the building and repairing of the fence inclosing the strip, and occupancy in relation thereto, is not cause for reversal, though such testimony may have been incompetent. *Miller v. Shuming*, 135 Mich. 654, 98 N. W. 385, 10 D. L. N. 923.

(t) *In action for injuries to a servant, exclusion of question tending to show that servant loosed belts while machinery was in motion.*

Where, in an action for injuries to a servant, the answer alleged that such servant was skilful, the exclusion of a question tending to show that it was the fellow-servant's habit to loose belts while the machinery was in motion, and to put in the lacing before he put the belt over the shaft, was harmless as to defendant, since it tended to show that the servant, who had been alleged to be skilful and experienced, was habitually negligent. *Grijalva v. R. Co.*, 157 Cal. 569, 70 P. 622.

(u) *On issue whether petitioner was testatrix's illegitimate daughter, exclusion of evidence that testatrix never mentioned having any daughter.*

On an issue whether petitioner was testatrix's illegitimate daughter, the exclusion of evidence that testatrix had never mentioned having any daughter was not prejudicial, where petitioner not only made no claim that testatrix had ever recognized her as her daughter, but produced evidence that she had not. *Kennedy, In re* (Cal. Sup.), 36 P. 1030.

- (v) *On issue whether a written contract was drawn between plaintiff and defendant, refusal to permit defendant to testify whether a book contained a record of such transaction.*

On an issue whether a written contract was drawn up between plaintiff and defendant, where there was the positive evidence of two witnesses for plaintiff that such a contract was drawn, a refusal to permit defendant to testify as to whether a book containing a record of such transaction kept by him did not show an entry of a certain date of the drawing of such contract, was not reversible error, it appearing that defendant did not offer to prove that the book contained no entry in regard to the contract. *McRae v. Argonaut Land, etc., Co.* (Cal. Sup.), 54 P. 743.

- (w) *Excluding permissible evidence when fact otherwise proved.*

A judgment will not be reversed because of the exclusion of admissible evidence, where the fact to which it was adduced was otherwise proved. *Tate v. Watts*, 42 Ill. App. 103; *Reed v. Rich*, 49 Ill. App. 262; *R. Co. v. Wedel*, 144 Ill. 9; *Garwood v. Wood*, 34 Cal. 248; *Stewart v. Whittemore* (Cal. App.), 84 P. 841; *Boulard v. Calhoun*, 13 La. Ann. 445; *Daniels v. Dayton*, 49 Mich. 137. 13 N. W. 392; *Chambers v. Hill*, 34 Mich. 523; *Pierson v. R. Co.*, 149 Mich. 167, 14 D. L. N. 405, 112 N. W. 923; *Drake v. Surget*, 36 Miss. 458; *Northrop v. Diggs*, 146 Mo. App. 145, 123 S. W. 954; *Crain v. Miles*, 154 Mo. App. 338, 134 S. W. 52; *Town of Litchfield v. Londonberry*, 39 N. H. 247; *Jackson v. Shaaff*, 1 Ore. 246; *Brabbits v. R. Co.*, 38 Wis. 289; *R. Co. v. Pollock*, 16 Wyo. 321, 93 P. 847.

- (x) *Answers to other questions supplied facts withheld by excluded question.*

Upon an issue between a creditor and the wife of his debtor, as to whether the debtor or his wife, who was empowered to trade as a feme sole, was the owner of a crop raised on the land on which they lived, the wife was a competent witness to prove that she made a contract with her husband, by which she employed him to act as her agent in managing and cultivating the farm, and in attending to her business generally, although all that occurred between them with reference to the contract was private, and, in the absence of third persons; but the refusal of the court to allow the wife to answer a question, in response to which she avowed she would have made such statements, was not prejudicial, as substantially the same facts were put in evidence by her answer to other questions which were not objected to. *Sydnor v. Petrie*, 13 Ky. L. R. (abst.) 972.

- (y) *In action for goods sold, where defendant filed a set-off for damages from plaintiff's refusal to accept wood purchased of defendant, refusal to allow defendant to testify to price for which she afterwards sold the wood.*

In an action for goods sold in which defendant filed a set-off for damages sustained by plaintiff's refusal to accept wood purchased of defendant, it is harmless, if error at all, to refuse to allow the defendant to testify as to the price for which she afterwards sold the wood, when she had already stated the amount of her loss, and that the same was the difference between the contract price and the sum for which she was obliged to sell the wood. *Goldman v. Bashore*, 82 Cal. 146, 22 P. 82, two judges dissenting.

(z) *Defendant refused the right to testify in bastardy proceeding.*

Defendant, in a bastardy proceeding, was refused the privilege given by Revised Statutes, chap. 6, sec. 7, of testifying, because he had entered the court armed, and heard the testimony of other witnesses after the court had excluded the witnesses. Held, that though such refusal was error, the court of appeals would not reverse the judgment, in the absence of anything in the record to show that defendant would have contradicted the commonwealth's evidence. *Francis v. Commonwealth*, 66 Ky. (3 Bush) 4.

(a-1) *Excluding books cured error in admitting extracts therefrom.*

Where certain books were admitted in evidence and extracts were read therefrom, and afterwards the books were excluded. Held, that such ruling removed any error not prejudicial resulting from the improper admission of evidence of witnesses with reference to such books. *Rea v. Scully*, 76 Iowa, 343.

(b-1) *Errorncous exclusion of letter cured by other evidence.*

A judgment which does substantial justice will not be reversed on account of the exclusion of a letter, when all that it would have proven is fully shown by other evidence. *Hallock v. Cutler*, 71 Ill. App. 471.

(c-1) *Exclusion of cross-examination tending to impeach witness where impeachment otherwise fully proved.*

The judgment will not be reversed for exclusion of matter on cross-examination tending to impeach the witness, where the impeaching matter was otherwise fully proved. *De Soto v. Buckles*, 40 Ill. App. 85.

(d-1) *Exclusion of testimony of witness where he had no personal knowledge of the matter inquired about.*

The exclusion of the testimony of a witness is not ground of error, where the witness does not appear to have had any personal knowledge of the matter about which he was called. *Dunleavy v. Stockwell*, 45 Ill. App. 230.

(e-1) *Excluding evidence unaffecting the result.*

The exclusion of evidence is not ground of error where, if the evidence had been admitted, it would have been altogether without avail, and where the result must have been the same. *Provatt v. Harris*, 150 Ill. 40; *Bunker Hill v. Pearson*, 46 Ill. App. 47.

(f-1) *Exclusion of evidence where the fact is conceded.*

The exclusion of evidence is not ground of error, where the evidence was to a point which was assumed and conceded. *Bloomington Canning Co. v. Bessee*, 48 Ill. App. 341; Cf. *Biederman v. Brown*, 49 Ill. App. 483, where result was not affected nor jury misled thereby.

(g-1) *Exclusion of evidence where party had benefit of other uncontradicted similar evidence.*

The exclusion of evidence is not ground of error, where the party had the benefit of other uncontradicted evidence to the same point. *Seybond v. Morgan*, 43 Ill. App. 39.

(h-1) *Excluded evidence which, had it been admitted, would have proved the issue for the opposite party.*

A party can not complain of the exclusion of evidence which, if admitted, would have proved the issue in favor of the opposite party. *Meyer v. Krohn*, 114 Ill. 574.

(i-1) *Exclusion of evidence in mitigation of damages.*

The exclusion of evidence offered as a defense is not erroneous, where the evidence is admissible merely in mitigation of damages. *Byler v. Asher*, 47 Ill. 101.

(j-1) *Not error to exclude testimony of employee, acting in two capacities, as to in which he was acting at time in question.*

It is not error for the court to exclude the testimony of an employee of a railroad company, who acted at times as a duly commissioned policeman, and at other times as the agent of the company, as to whether, in doing a certain act, he intended to act as a policeman or as an agent of the company. *R. Co. v. Fiebach*, 13 O. C. C. n. s. 369, 22 O. C. D. 74, rev. o. o. g. 87 O. S. 254.

(k-1) *Refusal to admit superfluous evidence.*

In a suit by an agent to recover commission for the sale of land, evidence as to the efforts made to carry through the negotiation is competent, yet the refusal of the court to admit such evidence does not constitute reversible error, where it appears that the duty of the agent was simply to produce a purchaser, and the fact that a purchaser was produced by the agent is not disputed. *Bowman v. Hartman*, 6 O. C. C. n. s. 264, 17 O. C. D. 309. *affm'd. w. o. Hartman v. Bowman*, 74 O. S. 509; *Whitmore v. Keith*, 18 O. S. 134; *Miller v. Gleason*, 18 O. C. C. 374, 10 O. C. D. 20; *Richard v. Bird*, 4 La. Rep. 309.

(l-1) *Rejecting evidence in chief where same is received in rebuttal.*

Error in rejecting testimony of a witness offered in chief is immaterial, where the same is given in rebuttal. (*N. C.*) *Chesterfield Mfg. Co. v. Leota Cotton Mills*, 194 F. 358, 114 C. C. A. 318.

(m-1) *Exclusion of book entry cured by testimony of another witness.*

So, in an action by a broker for commissions, where the exclusion of a certain book entry is assigned as error, but it appears that its admission could have proved only what was actually proved by the witness on whose testimony it was to be established, it is not ground for reversal. *Gross v. Locke*, 48 Mich. 266, 12 N. W. 181.

(n-1) *Account book excluded, other evidence being sufficient.*

Though an account book of original entries shown to have been kept in the usual course of business is admissible in evidence in favor of the person by whom it is kept, error can not be predicated on the exclusion of such account book, where there was other evidence to establish the facts shown by such book. *Seligman v. Rogers*, 113 Mo. 642, 21 S. W. 94.

(o-1) *Striking out testimony previously given on direct examination.*

Order striking out testimony given on re-direct examination, as to matters testified to on direct examination, is harmless. *Spear v. Lyon*, 89 Cal. 37, 26 P. 619.

(p-1) *Excluding a preceding oral executory agreement.*

It is not ground to exclude evidence as to an oral executory agreement of settlement theretofore entered into between the parties. *Brick Co. v. Chojinicki*, 14 O. C. C. n. s. 599, 23 O. C. D. 356, affm'd, w. o. 83 O. S. 450.

(q-1) *Improperly excluded evidence that was not prejudicial.*

A judgment will not be reversed on the ground that evidence was improperly excluded, unless it be

shown that the plaintiffs in error were prejudiced thereby. *Whitman v. Keith*, 18 O. S. 134.

(r-1) *Excluded evidence not tending to prove party's side of the case.*

If the excluded evidence does not tend to prove the party's side, it is not reversible error. *Hunt v. Daggett*, 7 O. Dec. Repr. 266, 2 Bull. 22.

(s-1) *Act of court in excluding testimony proper, erroneous reason therefor immaterial.*

The giving of a wrong reason by the trial judge for the exclusion of certain testimony would not be ground for a reversal of the resulting judgment, where the exclusion was itself proper; but in the case at bar the reason given in the judgment entry that the paper writing was excluded "on the ground that it did not tend to show a legal title in the plaintiffs of the land in question," is entirely consistent with the finding of the reviewing court as to the inadmissibility of the writing upon which the title depended. *Banner v. Ison*, 8 O. C. C. n. s. 260, 18 O. C. D. 459.

(t-1) *Where plaintiff had fully acknowledged signing certificates, their exclusion when offered by defendant was harmless error.*

Where plaintiff on his examination in chief, and also on his cross-examination, had acknowledged that he signed certain certificates, admitted his connection with them, and explained the transactions to which they related; the erroneous exclusion of the certificates, when offered by defendants, was harmless, though such evidence was relevant under the issues. *Peck v. Franham*, 24 Col. 141, 49 P. 364.

- (11-1) *Evidence excluded on examination in chief cured by admission on cross-examination.*

Error in the exclusion of evidence on the examination of a witness in chief was cured by the admission thereof on cross-examination. *Kellum v. Brode*, 1 Cal. App. 315, 82 P. 213.

- (v-1) *In action on a note, excluding evidence tending to show defendant's liability as a surety.*

In an action on a note, the exclusion of evidence to show that defendant is liable only as surety is harmless error, where an instruction stated that the evidence shows that such defendant was a surety. *Pimental v. Marques*, 109 Cal. 406, 42 P. 159.

- (w-1) *Error in excluding photograph.*

Where, in an action by a lot owner to recover damages sustained to his lot by reason of the grade of the street in front of it, the jury was fully informed by the witnesses as to the nature and extent of the change of the grade, the contour of the ground, and all the circumstances, error in excluding a photograph of a particular locality was harmless. *Kent v. City of St. Joseph*, 72 Mo. App. 42.

- (x-1) *Rejection of proceedings of lodge showing accusation, etc., charging intoxication.*

Where, in an action on a benefit certificate in a beneficial order, evidence was introduced showing that the grievance committee of the lodge interviewed the insured to ascertain whether the accusation that he was violating the laws of the order in becoming intoxicated, and, if true, to induce him to reform, and the results established, the rejection of the record of the proceedings of the lodge, showing accusation, instructions of com-

mittee, etc., was harmless. *Neudeck v. Gd. Lodge A. O. U. W.*, 61 Mo. App. 97.

(y-1) *Exclusion of evidence showing assignor's insolvency.*

Where, in an attachment proceeding, several persons were garnisheed as debtors on open account of the defendant, and an interplea was filed by one claiming the accounts by assignment from defendant prior to the garnishment, and the fact that the interpleader knew that the assignor was in failing circumstances when he transferred the accounts appeared by the interpleader's own evidence; other evidence showing the assignor's insolvency and notice to the interpleader of the notoriety of that fact, was immaterial and unnecessary and its exclusion harmless. *Claffin v. Summers*, 39 Mo. App. 419.

(z-1) *Refusal to permit plaintiff to be asked whether he "thought those whiskeys were paid for."*

On an issue whether a sale of whiskey to plaintiff was in fraud of the seller's creditors, the court refused to permit plaintiff to be asked on cross-examination whether he "thought those whiskeys were paid for;" plaintiff had already testified on cross-examination that he knew of no debts owed by the seller except what he assumed. Held, not prejudicial error. *Pierson v. Slifer*, 52 Mo. App. 273.

(a-2) *Exclusion of evidence of the condition of the goods.*

On an issue of fraud in the taking of goods by a creditor in satisfaction of a debt, the exclusion by the court of evidence of the condition in which the goods taken were on their arrival in St. Louis, the residence of the creditor, as tending to show that they were hastily packed, etc., was harmless, where the court admitted all the evidence which was adduced on either side as to what

took place at Centralia, which was the residence of the debtor, and the place where the goods were packed. State, to use of Glaser, v. Mason, 24 Mo. App. 321.

(b-2) Exclusion of letter from plaintiff to defendant.

In an action by a traveling salesman for breach of a contract of employment, defendant claimed that plaintiff falsely represented before he was employed that he was well-acquainted with the trade in a certain state, and had traveled extensively therein for several years. Held, that the plaintiff had, after the commencement of his employment, written a letter to defendant stating that he did not have any list of the customers in the state in question, had no tendency to prove that plaintiff stated to defendant that he had never traveled in the state, and hence its exclusion was harmless to plaintiff. McCain v. Desnoyers, 64 Mo. App. 66.

(c-2) . Exclusion of entries made upon order book.

There was no reversible error in excluding entries made upon the order book of appellant, where it had already been shown that a similar entry had been made on the ledger book by appellant's credit man, and that when the order for the goods had been proved by him, he had directed the charge to be made against the appellee. The admission of the entry on the order book, under these circumstances, would have been a mere multiplicity of entries resting on the trustworthiness of the same person. Mo. Tent & Awning Co. v. Legg, 59 Mo. App. 502.

(d-2) Exclusion of rebutting evidence to prove proper construction of sewer.

Where, in an action against a city for damages for injuries sustained by reason of a defective street, the

gravamen of the action was the negligence of the city in making the back-fill above a sewer constructed in the street itself; the exclusion of evidence repeating the testimony tending to prove that the sewer was properly constructed was not prejudicial. *Smith v. City of St. Joseph*, 42 Mo. App. 392.

(e-2) *Refusal to allow witness to answer question, whether note contained changes and alterations.*

In an action against the estate of a deceased maker of the note, where erasures or changes are apparent on its face, and there is no offer to show that they were made after execution, it is not reversible error to refuse to allow defendant's witness, a banker, who testified that, in his opinion, the alleged maker did not sign the note, to answer questions as to whether it contained changes and alterations, and whether the amount was changed. *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075.

(f-2) *Exclusion of evidence that railroad was constructed by a competent and skilful engineer.*

In an action against a railroad for causing death of an engineer, where the defense is, that the washout was caused by an extraordinary rain-storm, and two of defendant's witnesses testified that the railroad was, in all respects, properly and skilfully constructed, it is not reversible error to exclude defendant's offer to prove by the same witnesses that the person, under whose supervision the railroad was constructed, was a competent and skilful engineer. *McPherson v. R. Co.*, 97 Mo. 253, 10 S. W. 846.

(g-2) *Excluding evidence tending to show assured's interest.*

In an action on an insurance policy in which the interest of assured in the policy was shown by plaintiff's

testimony, it was not prejudicial error to exclude evidence by defendants tending to show the amount of assured's interest. *Berthold v. Insurance Co.*, 2 Mo. App. 311.

(h-2) Exclusion of testimony of inspection of cross-ties.

A contract for getting out ties provided for an inspection by defendant's inspector. In an action for defendant's breach defendant offered testimony as to the character of an inspection made by its inspectors when they were stopped by plaintiff. Held, that the exclusion of the testimony did not prejudice defendant, as the ties were accepted under a subsequent inspection. *Chapman v. R. Co.*, 146 Mo. 481, 48 S. W. 646.

(i-2) Exclusion of evidence not sufficiently material to affect the result.

Judgment should not be reversed upon exceptions to the exclusion of evidence manifestly not so material that it ought to have affected the result. *Smith v. Longmire*, 15 Weekly Digest (N. Y.), 353; *Veum v. Sheeran*, 88 Minn. 257, 92 N. W. 965.

(j-2) Effect of erroneous exclusion rebutted by other evidence.

The erroneous exclusion of evidence was harmless where the effect of such evidence was conclusively rebutted by evidence afterwards admitted. *Thielen v. Randall*, 75 Minn. 332, 77 N. W. 992.

(k-2) Rejection of evidence admissible for another purpose.

Where evidence is offered for a particular purpose, its rejection is not reversible error, though it was admissible for another purpose not called to the attention of the court, especially where such purpose is wholly inconsistent with the theory on which the proponent is

trying the action. *Mareck v. Minneapolis Trust Co.*, 74 Minn. 538, 77 N. W. 428.

(l-2) *Competent evidence excluded which would not have given a cause of action.*

The exclusion of competent evidence offered by plaintiff is not prejudicial error, where it appears that, even if the evidence were admitted, no cause of action would have been proved. *Hewitt v. Blumenthalz*, 33 Minn. 417, 23 N. W. 858.

(m-2) *Excluding evidence which would not have benefited the party offering it.*

The exclusion of proper evidence is not prejudicial error, where it appears that, if admitted, it would not have benefited the party offering the evidence. *Hobart v. Co. of Plymouth*, 100 Mass. 159; *Bell v. Zelmer*, 75 Mich. 66, 42 N. W. 606.

(n-2) *Proper evidence excluded not affecting the verdict.*

On appeal to the supreme court the verdict will not be disturbed on the ground that evidence was improperly rejected by the trial court, where no injury resulted to either party by such rejection. *Chapman v. Dodd*, 10 Minn. 350 (Gil. 277); *Duncan v. Kohler*, 37 Minn. 379, 34 N. W. 594.

(o-2) *In an action for deceit, exclusion of testimony that plaintiff relied on the statement of a conspirator with defendants as to rental value of the property.*

In an action for deceit in an exchange of properties, where plaintiff testified that the relief upon defendant's representations made through fictitious leases as to the rental value of the property given by defendants, the exclusion of testimony that plaintiff relied on the statement of a conspirator with defendants as to the rental value of

the property, which statement corresponded with the rental fixed by the leases, was harmless to plaintiff. *Pinch v. Hotaling*, 142 Mich. 521, 106 N. W. 69, 12 D. L. N. 841.

(q-2) *Exclusion of photograph of sidewalk.*

The exclusion of a photograph in evidence to show the condition of a sidewalk was without prejudice, whether it was otherwise admissible or not, where it did not show the condition of the walk in the particulars which were in dispute. *Ness v. City of Escanaba*, 142 Mich. 404, 105 N. W. 899, 12 D. L. N. 753.

(r-2) *Exclusion of inconclusive evidence.*

A judgment will not be reversed because the court below erred in excluding testimony, so indirect and inconclusive that, under the circumstances of the case, it could not have operated to the prejudice of the exceptors. *Buschman v. Codd*, 52 Md. 202.

(s-2) *Exclusion of evidence that brakeman could not read.*

The exclusion of evidence that plaintiff, a brakeman, could not read, as bearing on the question whether he had notice of the rule requiring the use of coupling-sticks, is not error where the evidence shows, without contradiction, that the use of a coupling-stick would not have prevented the accident. *Rogers v. R. Co.*, 15 Ky. L. R. 686, 25 S. W. 269.

(t-2) *Refusal to permit railroad agent to testify.*

A refusal of the court to allow the defendant to introduce its agent, after it had introduced other witnesses, was not prejudicial, where it is manifest from the avowal as to what the witness would testify, that his testimony would not have changed the result. *R. Co. v. Wahle*, 13 Ky. L. R. (abst.) 463.

(u-2) *Exclusion of proper question in kuklux case.*

The alleged malicious prosecution was for kukluxing defendant, by whipping him in the night. It appeared that at the time of the whipping plaintiff occupied another room in the same house, and on cross-examination he said that he heard the licks, and knew that defendant was being whipped, and heard a person who lodged in the adjoining room call to him, but that he made no response. On re-examination he was asked why he did not respond, and the question was disallowed. Held that, though the jury might have inferred that the reason was that he was engaged in whipping defendant, yet the ruling will not be held prejudicial, as it can not be said that he would have given any explanation which would be competent or material evidence. *Redman v. Stowers*, 11 Ky. L. R. 429, 12 S. W. 270; so, for the same reason, a refusal of the court to permit a witness to state a conversation between those engaged in whipping, will not be held prejudicial. *Id.*

(v-2) *Excluding question put to plaintiff's physician cured by testimony of defendant's physician.*

The error of excluding a question to plaintiff's physician, in an accident case, on cross-examination, as to whether, in his opinion, an examination of the plaintiff, at which he was present, and about which he testified, was a fair and full examination; held, insufficient to require a reversal, where there is uncontradicted testimony of the accuracy of such examination by the defendant's physician who made it. *McSwyny v. R. Co.*, 37 St. Rep. 363, 7 N. Y. Supp. 456.

(w-2) *Excluding clause of contract afterwards read on cross-examination.*

Where the clause of a contract sought to be admitted

by plaintiff in evidence was excluded by the court, and the same was afterward read on cross-examination of one of the defendants, and the latter examination concerned the same, plaintiff can not be deemed to be injured by the exclusion. *Claffy v. O'Brien*, 25 Abb. n. c. 187, 32 St. Rep. 54, 10 N. Y. Supp. 103, *affm'g* 7 N. Y. Supp. 456.

(x-2) *Excluding evidence which the other party afterward offered to admit.*

The exclusion of evidence, which the other party subsequently offered to allow him to prove, which offer he did not avail himself of; held, not to prejudice defendant, and to afford no sufficient ground for reversal. *Dearing v. Pearson*, 8 Misc. 269, 59 St. Rep. 201, 28 N. Y. Supp. 715, *affm'g* 6 Misc. 616, 26 N. Y. Supp. 74, 55 St. Rep. 774, *dist'g* *Furst v. R. Co.*, 72 N. Y. 542.

(y-2) *Exclusion of evidence of husband on cross-examination.*

The exclusion of evidence from the husband of plaintiff, on his cross-examination as a witness in her behalf to show his interest; held, not reversible error, since his interest sufficiently appeared from his relation to plaintiff. *Beyer v. Con. Gas Co.*, 44 App. Div. 158, 94 St. Rep. 628, 60 N. Y. Supp. 628.

(z-2) *Excluded evidence rectified by other proper evidence.*

A reversal is not authorized because their proof was excluded on the trial, if it appears to have afterward been fully brought out by other testimony. *Gregory v. Lindsey*, 61 N. Y. 649.

(a-3) *Exclusion of evidence of bank holding money.*

After the proposed purchaser had testified that he could not have raised the whole amount required when the contract called for it, and it appeared that he could

make the payment due upon the execution of the contract; held, that the exclusion of evidence as to what banks he had the money in, and as to whether he could have paid the whole when the contract was made, was not error, since such evidence was immaterial. *Levy v. Ruff*, 4 Misc. 180, 53 St. Rep. 174, 23 N. Y. Supp. 1002, affm'g *Abb. n. c.* 291, 3 Misc. 147, 51 St. Rep. 491, 22 N. Y. Supp. 744.

(b-3) *Rejection of evidence as to meaning of word "incompatibility."*

The erroneous rejection of evidence of a conversation between master and servant in regard to the meaning of the word, "incompatibility," in a contract of employment; held, not sufficient ground for reversal, where other sufficient ground for the servant's discharge from employment was shown. *Gray v. Shepard*, 79 Hun 467, 61 St. Rep. 452, 29 N. Y. Supp. 975, affm'd, 147 N. Y. 177, 69 St. Rep. 530.

(c-3) *In action for injuries, exclusion of statement of conductor to company.*

In an action against a street railway company to recover for injuries to the plaintiff, the exclusion of a statement of the conductor to the company concerning the accident, is not error constituting a cause for reversal, if the statement gives substantially the same account of the accident as that given by the conductor at the trial. *Williamson v. Brooklyn Heights R. Co.*, 53 App. Div. 399, 99 St. Rep. 1054, 65 N. Y. Supp. 1054.

(d-3) *Exclusion of evidence which could not have helped appellant.*

The defendant is not entitled to the reversal of a judgment for the improper exclusion of evidence, where no

evidence so excluded could have helped him. *Frothingham v. Satterlee*, 70 App. Div. 613, 75 N. Y. Supp. 21.

(e-3) *Exclusion of bill against company, in action against the president personally.*

Where, in an action against the president of a corporation to recover from him personally for services performed, a bill made out by the plaintiff for the work in question to the corporation is erroneously excluded, the error does not call for a reversal, if the plaintiff testifies it is a clerical error to make the bill out against the corporation. *Gillin Printing Co. v. Traphagen*, 36 Misc. 774, 74 N. Y. Supp. 900, 10 Ann. Cas. 385.

(f-3) *Excluding competent evidence cured by instruction to jury.*

The court excluded competent evidence as to the measure of damages, but instructed the jury that they should return a verdict for nominal damages only, if they found for the plaintiff. Held, that inasmuch as the verdict was for defendant, the exclusion of competent evidence which went only to the measure of damages was not reversible error. *Martin v. R. Co.*, 7 Okl. 452, 54 P. 696.

(g-3) *Subsequent exclusion cured error in admitting evidence.*

In an action by A, administrator, against B to charge dower. A was allowed to prove that B said there was no dower in the land, the court being under the mistaken supposition that the statement was made after B acquired title. Subsequently, on discovering the contrary to be the case, the court excluded the evidence and B assigned the admission of the evidence as error. Assignment overruled. *Unangst v. Kraemer*, 8 Watts & S. (Pa.) 301; *Insurance Co. v. Cross*, 9 Heiskel (Tenn.) 283.

(h-3) *Exclusion of letter that would have proved nothing.*

In an action by A against B to recover rent on a lease, B offered evidence to prove A's signature to a letter from him to B. The evidence was ruled out by the court, B excepted, and subsequently assigned the ruling for error; the letter would have proved nothing if it had been admitted. Affirmed. *Walthour v. Spangler*, 31 Pa. 523.

(i-3) *Rejection of paper showing payment of ground rent.*

A sold property to B on which ground rent was due, leaving in B's hands sufficient purchase money to pay the ground rent. Subsequently A was sued by C, administrator, for said ground rent and paid the same. He thereupon brought suit against B to recover the purchase money left in B's hands. A offered in evidence a paper showing payment by B to C of ground rent subsequently to the sale by A to B, which paper was rejected on insufficient ground. The only effect of the paper would have been to show that C was the proper party to receive the ground rent, which fact the judge assumed in his charge to the jury. Error having been assigned to the rejection of the paper. Held that, as the error had not injured A, a reversal would not be allowed therefor. *Evans v. See*, 23 Pa. 88.

(j-3) *Exclusion of reproaches of woman against her husband.*

The petulant reproaches of an old woman in calling her husband "an old fool," and in saying he was deranged when provoked at him, being offered as evidence of admission of the mental condition of the testator and excluded, it was held not to be error, on the ground that they ought not to have had and should not have had any influence on the verdict. *Sellars v. Sellars*, 2 Heiskel (Tenn.) 431.

(k-3) *Refusal of evidence that a defendant had notified plaintiff to enforce judgment cured by correct judgment.*

In scire facias to revive a judgment the judge refused to receive evidence for the defense that one of the defendants, a surety in the judgment, had notified the counsel and agent of the plaintiff to enforce the judgment. The court gave as a reason for the rejection that such notice was insufficient, and that notice should have been given to the principal. The defendant, as a matter of fact, was not entitled to prove the notice. Held, that while the judge's reason for rejecting the testimony was wrong, since the judgment itself was correct, it would not be reversed. *Thomas v. Mann*, 28 Pa. 520.

(l-3) *Rejection of act of assembly to prove illegitimacy.*

A in ejectment against B, claiming under C, who was alleged by B to have been illegitimate, and an Act of the Assembly offered in evidence of such illegitimacy was rejected by the court. Verdict and judgment was given to A for one-third of the land in question, only thus confirming the illegitimacy of C. B took a writ of error and assigned the rejection of the Act of the Assembly offered by him. Assignment dismissed. *Wright v. Wood*, 23 Pa. 120.

(m-3) *Testimony rejected on the ground of want of color of title.*

Although the court erred in rejecting the testimony offered by the defendant, on the ground assumed (want of color of title), yet, as the court could not have rendered judgment for the defendant on the question of defect in the notice, and it therefore would be useless to reverse the judgment, it will be affirmed. *Bristoe v. Evans*, 2 Overton (Tenn.) 341.

(n-3) *Excluding evidence that plaintiff had not paid taxes cured by evidence that defendant had.*

In ejectment, any error in excluding evidence that the plaintiff had not paid taxes upon the land, and knew that defendant was paying them, was harmless, when the payment of the taxes by defendant was established by other evidence, and the judgment gave him a lien upon the land for the amount of such taxes. *Dameron v. Jamison*, 145 Mo. 483, 45 S. W. 258.

(o-3) *In prosecution for carrying weapon, excluding letter conveying threats.*

In a prosecution for carrying a weapon about the streets of a city, the action of the trial court in excluding a certain letter conveying threats to defendant was harmless, where defendant was permitted to state all about a letter and its contents, and he spoke of writing a poster, and much other irrelevant and immaterial matter concerning the same. *City of Linneus v. Dusky*, 19 Mo. App. 20.

(p-3) *Subsequent answer cured exclusion of testimony on direct examination.*

The error in excluding from a hypothetical question asked of an inspector as to the space within which a street car could be stopped, the element whether the car was empty was harmless, where, on cross-examination, the witness testified that it would make no difference whether the car was empty or filled with passengers. *Meeker v. R. Co.*, 178 Mo. 173, 77 S. W. 58.

(q-3) *Exclusion of evidence by druggist of medicines purchased by plaintiff.*

Error in excluding the evidence of a druggist that plaintiff purchased medicines for syphilis, which disease was claimed to have been the principal cause of the in-

jury was harmless, where plaintiff admitted on the trial that he had the disease. *Brown v. R. Co.*, 66 Mo. 588.

(r-3) *Exclusion of evidence to show ill-will.*

Where the object of evidence was to show ill-will toward a party, its exclusion was harmless, when that fact was abundantly proven by other evidence. *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255.

(s-3) *Excluding evidence as to conflict in valuation of property.*

Where, in an action on a fire policy, plaintiff claimed that the goods were of greater value than that at which they had been returned for taxation, a question as to whether that returned was false or true was proper, but its exclusion was harmless where the assured subsequently admitted that the statements were false. *Probst v. Insurance Co.*, 64 Mo. App. 408.

(t-3) *Excluding evidence of injury to plaintiff by refusing to honor his checks cured by subsequent full examination.*

Where, in an action against a bank for damages to plaintiff's business and credit consequent on the bank's refusal to honor checks drawn by plaintiff on it, the court permitted the same inquiry to be pursued to its fullest extent, the previous exclusion on defendant's objection to plaintiff's testimony as to the extent of the injury done him in his business by the refusal to honor his checks is harmless error. *Roe v. Bank*, 167 Mo. 406, 67 S. W. 303.

(u-3) *Exclusion of question cured by answer on re-examination.*

Where plaintiff was asked on cross-examination whether he had ever been indicted for hog stealing, and the question was excluded, but plaintiff was afterwards

allowed on examination by his own counsel to answer the question, defendant was not prejudiced by the exclusion of his question. *Travis v. Insurance Co.*, 47 Mo. App. 482.

(v-3) *In action to apportion annuity excluding inventory of testator's estate.*

In a suit involving a right to apportion an annuity to the widow, the erroneous exclusion of the inventory of testator's estate, offered to show that the amount which the widow received as residuary legatee was so large that an apportionment of the annuity was not necessary to her support, was harmless, where the order of distribution made on the petition of the widow afforded ample evidence of no necessity to provide for her support. *Wiegand v. Woerner*, 155 Mo. App. 227, 134 S. W. 596.

(w-3) *Excluding evidence tending to show contract of employment was for an indefinite period.*

Where, whether plaintiff was employed by the year or at the employer's will, he relinquished his contract upon an agreement to pay plaintiff a certain sum monthly, constituting a valid accord and satisfaction, exclusion of competent evidence tending to show that the contract of employment was for an indefinite period, in an action to recover an unpaid balance due under the agreement, was not reversible error. *Arnold v. Railway Steel Spring Co.*, 147 Mo. App. 451, 126 S. W. 795.

(x-3) *Excluding written instrument, when secondary evidence is received in lieu thereof.*

Error committed in excluding a written instrument from evidence, is not ground for reversal where secondary evidence is received in lieu thereof. *Moore v. Linn* (Okl. Sup.), 91 P. 910; *Norman v. Shelt*, 142 Mo. App. 138, 125 S. W. 527.

(y-3) *Refusal to permit defendant, to testify that he acted in good faith.*

In a suit for damages for fraud, the refusal of the trial court to permit the defendant to testify that in the transactions he acted in good faith, and he intended to surrender the notes and believed he could do so, if error at all, would be without prejudice, the notes afterward having been surrendered or tendered. *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411.

(z-3) *Refusal to permit question as to the effect of syphilis.*

Where, in an action for injuries to and death of a servant, defendant was allowed wide latitude in the cross-examination of plaintiff's physician on the issue, whether decedent's death was the result of the accident, he was not prejudiced by the court's refusal to permit a question as to whether syphilis in a patient advanced to the stage of gumma in the brain, would produce thrombosis, in the absence of any offer to prove that deceased was afflicted with the disease. (Tenn.) *Wabash Screen Door Co. v. Lewis*, 184 F. 260, 146 C. C. A. 402.

(a-4) *Excluding affidavits which counsel agreed might be given the effect of depositions.*

The errors, if any, on the part of the court of claims in excluding ex parte affidavits, which counsel had agreed might be given the effect of depositions, does not call for a reversal of the judgment dismissing the petition of Indian claimants, for their alleged proportional shares of appropriations and fulfilling of treaty obligations, where the admission of the evidence could not have changed the result. *Sac & Fox Indians, etc., v. Sac & Fox Indians, etc., in Oklahoma*, 220 U. S. 481, affm'g judgm't, 45 Ct. Cl. 287.

(b-4) *Exclusion of evidence, inadmissible as case then stood, but pertinent as case later developed.*

The exclusion of evidence, which was inadmissible as the case stood when offered, is not sufficient cause for reversal, though it would have been pertinent to the case as subsequently developed, and its rejection if offered subsequently would have been erroneous. *Heroy v. Kerr*, 21 N. Y. Super. Ct. (8 Bosw.) 194.

(c-4) *Exclusion of admissible evidence was immaterial.*

In an action for taking ore from plaintiff's vein, defendant offered evidence tending to show his belief that the vein was his own. Held, that the exclusion of such evidence, even if it was admissible to show good faith, was not material error, it appearing from the verdict that the jury must have found that defendant acted in good faith. *Colorado Cent. Con. Min. Co. v. Turck* (Colo.), 70 Fed. 294, 17 C. C. A. 128; *Hooker v. Village of Brandon*, 75 Wis. 8, 43 N. W. 741; *Dennenburg v. Guernsey*, 80 Ga. 549, 7 S. E. 105; *Fender v. Fender*, 123 Ill. App. 105; *Sterling v. Lockett*, 7 Mart. n. s. (La.) 198; *Blomme v. Lunch*, 26 S. C. 300, 2 S. E. 136; *Lewis v. McReavy*, 7 Wash. 294, 34 P. 832.

(d-4) *Rejecting evidence for defendant cured by excluding that part of claim from the verdict.*

Error in rejecting evidence for defendant against a part of plaintiff's claim, and instructing the jury favorably for plaintiff in relation thereto, is cured by the exclusion of that part of the claim from the verdict and judgment. *Musgat v. Wybro*, 33 Wis. 515.

(e-4) *Refusal to permit defendant to prove a necessary averment in the complaint.*

Error in refusing to permit the defendant to prove a

necessary averment in the complaint is harmless. *Johnson v. Gwinn*, 100 Ind. 466.

(f-4) *Exclusion of admissible evidence which could not have changed the result.*

The exclusion of admissible evidence which could not, if received, have changed the result, is harmless error. *Grigg v. Moss*, 81 U. S. (14 Wall.) 864, 20 L. ed. 740; *Iverson v. Hutton*, 119 U. S. 604, 30 L. ed. 509; (Wyo.) *Dolger v. Johnston*, 44 Cal. 182; *Fraser v. California St. Cable Co.*, 146 Cal. 114, 81 P. 20; *Mule v. Matthews*, 26 Cal. 455; *Goodard v. Enxler*, 123 Ill. App. 108, judgm't affm'd, 232 Ill. 462, 78 N. E. 805; *Wilson v. Hays, Ex's*, 109 Ky. 321, 22 Ky. L. R. 897, 58 S. W. 373; *Overly v. Paine*, 26 Ky. (3 J. Marsh.) 717; *Smith v. Doherty*, 109 Ky. 616, 22 Ky. L. R. 1238, 60 S. W. 380; *Doyle v. Etorney*, 13 La. Ann. 318; *Conser v. Snowden*, 54 Md. 175, 39 Am. Rep. 368; *Mason v. Finch*, 28 Mich. 282; *Hobart v. Co. of Plymouth*, 100 Mass. 159; *Wilkerson v. Allen*, 67 Mo. 502; *Tyler v. Tyler*, 78 Mo. App. 240; *Hart v. Johnson*, 6 Ohio 87; *Fullam v. Goddard*, 42 Vt. 162; *Ruffner's Heirs v. Hill*, 31 W. Va. 428, 7 S. E. 13.

(g-4) *Excluding evidence of value of stocks no fraud being shown.*

Plaintiff alleged that she was induced to purchase certain stock by fraudulent representations of the defendants, but there was no evidence to sustain the charge. Plaintiff excepted to rulings of the court upon the exclusion of certain evidence bearing on the value of such stock. Held, that such rulings were harmless, the court having found that there was no fraud in the transaction. *Roberts v. Bank*, 60 Hun 576, 14 N. Y. Supp. 432.

(h-4) *Excluding testimony not affecting the result when trial without a jury.*

A case tried without a jury will not be reversed for the exclusion of testimony where the result is not affected. *Hall v. Ots*, 77 Me. 122; *Orton v. McCord*, 33 Wis. 205.

(i-4) *Exclusion of evidence of acts of violence, where jury found acts were condoned.*

Improper exclusion of evidence as to acts of cruelty alleged in an action for divorce was immaterial, where the jury found the acts were condoned. *Morse v. Morse*, 25 Ind. 156.

(j-4) *Rejecting documents that showed nothing more than was known, and the facts in which were assumed by the court to be true.*

It was not reversible error to reject documents which were not shown to be relevant when offered, though subsequently it developed that they might properly be considered in connection with other evidence upon a particular issue, where no offer was afterwards made to introduce them, and it appears that, had they been received, they would have shown nothing more than was testified to orally, and assumed by the court to be true in finally passing on the issue. *Conant v. Johnston*, 165 Mass. 450, 43 N. E. 192.

(l-4) *Refusal to allow defendant to ask plaintiff whether he conveyed the property after the suit was brought.*

Where the record on appeal in an action against an elevated railroad company for injuries to abutting property shows that the premises were conveyed to a third person, and were afterwards reconveyed to plaintiff, re-

fusal to allow defendant to ask plaintiff whether he conveyed the property after the suit was brought did not prejudice defendant. *Kuhn v. R. Co.*, 11 Misc. Rep. 23, 31 N. Y. Supp. 859.

(m-4) *Exclusion of question as to whether there was not a subsequent accident at the same switch, where another witness so testified.*

In an action for injuries to plaintiff, a mail agent on defendant's train, received in an accident at a switch, the exclusion of a question whether there was not a subsequent accident at the same switch is harmless, where another witness testified as to such accident. *Grant v. R. Co.*, 108 N. C. 462, 13 S. E. 209.

(n-4) *Refusal to permit defendant to ask plaintiff's witness on cross-examination when he would do certain work.*

A refusal to permit a defendant to ask plaintiff's witness on cross-examination, "when he would do work upon marble that was stained," was harmless, when the witness had already testified substantially that stained marble should be treated early. *Skelton v. Fenton Elec. Light & Power Co.*, 100 Mich. 87, 58 N. W. 609.

(o-4) *Rejection of testimony of agent of insurance company as to contents of statement which had been in his office.*

After the introduction of an authenticated copy from the office of the treasurer of the commonwealth of a statement filed there by a foreign insurance company, and satisfactory evidence of unsuccessful search for the newspapers in which the statement is alleged to have been published, the rejection of testimony of an agent of the company that a copy of such statement which he had in his own office, was on file in that office, though

offered solely as evidence of the contents of the statement which the agent testified to have been in his office, and in connection with the testimony that such a statement was published, is not ground of exception. *Insurance Co. v. Dawes*, 72 Mass. (6 Gray) 376.

(p-4) *Excluding evidence of payment of defendant's judgment cured by other evidence supplying proof of fraud.*

In an action for the wrongful seizure of goods on execution as belonging to one who conveyed them to plaintiff, error in excluding evidence of the payment of defendant's judgment, offered to rebut any inference of fraud in the making of such conveyance is not ground for reversal, when there is evidence of other indebtedness on the part of the grantor in the conveyance which would supply proof of a fraudulent motive. *Hudson v. Willis* (Tex. Civ. App.), 28 S. W. 913, Williams, J., dissenting.

(q-4) *In action to recover for value of work, where union wages were in evidence, sustaining objection to question, "How much was it?"*

In an action to recover the value of work, where plaintiff's employee testified that he received stone-cutters' wages, and the union wages for stone-cutters were involved, sustaining objection to a question by defendant's counsel, "How much was it?" was harmless. *Cullen v. Gallagher*, 15 Misc. Rep. 146, 36 N. Y. Supp. 468.

(s-4) *Exclusion of admissible evidence to show conceded fact.*

The exclusion of admissible evidence to show a fact conceded or not disputed by the party against whom it is offered is harmless. *Insurance Co. v. Frederick* (Kan.), 58 F. 144, 5 C. C. A. 122; *Boseli v. Doran*, 62 Conn. 311,

25 A. 242. So of excluding evidence to prove facts admitted in the pleadings, Prichard v. Hopkins, 52 Iowa 120, 2 N. W. 1028.

(t-4) *Where evidence is improperly excluded, but subsequently witness states fact sought, the error is cured.*

Where evidence is improperly excluded, but the witness on a subsequent examination states substantially the same facts sought to be elicited, the error is cured. Omletta v. Davis, 69 Miss. 762, 12 S. 27; State v. Lewis, 20 Nev. 333, 22 P. 241; Churchill v. Price, 44 Wis. 540.

(u-4) *Defendant can not complain of rejection of proper evidence afterward erroneously introduced for another purpose.*

A defendant can not complain because proper evidence which is erroneously rejected, at his request, is afterwards erroneously introduced for another purpose. Rowland v. Huggins, 28 Conn. 121.

(v-4) *Where testimony was afterwards given covering point improperly excluded, the error was cured.*

Contestant alleged want of testamentary capacity resulting from the excessive use of intoxicants, and called the clerk of the druggist to prove that witness had been instructed not to sell alcohol to testatrix, and that this instruction was not given by decedent or a certain one of the legatees. Held, that the evidence failed to make it certain that either of the legatees had given the instructions, and that, as the druggist who was called by the legatees testified, on cross-examination, that, at the request of testatrix's daughter, he instructed the clerk not to sell testatrix alcohol, contestant could not complain of the rejection of the evidence. Appeal of Dale, 57 Conn. 127, 17 A. 757.

(w-4) *Excluding answer to question cured by witness testifying that he has told all he knows about the matter.*

Where, after an answer to a question intended to refresh the witness's recollection has been excluded, such witness states, unequivocally, that he has told all he knows about the matter, there is no error in excluding such answer. *Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752.

(x-4) *Exclusion of evidence as to income of physician cured by subsequent evidence.*

In an action by a physician for personal injuries, on the question of the amount of plaintiff's income, defendant excepted to the exclusion of evidence that plaintiff had offered to give a list of his patients to one to whom he had sold his business, but afterwards the witness was permitted to testify that plaintiff gave him a list of his patients, and that afterwards, in conversation with the purchaser, plaintiff named one as the number of patients then on his visiting list; held, that the exception could not be sustained, since the defendant had the benefit of the evidence excluded in the testimony subsequently given. *Nelson v. R. Co.*, 155 Mass. 356, 29 N. E. 586.

(y-4) *Evidence improperly stricken cured by subsequent evidence.*

Where, in an action for personal injuries resulting from a defective bridge, the testimony of a witness that, from his personal knowledge, the bridge was in good repair, is improperly stricken out, but is followed by testimony showing, in detail, the facts upon which his opinion is based, it is error without prejudice. *Merkle v. Bennington Tp.*, 68 Mich. 133, 35 N. W. 846.

(z-4) *Improper striking out of testimony that inflicted no prejudicial injury.*

Plaintiff, eight years old, testified that she fell by stepping into a crack between two boards in a city walk. A witness testified that she heard another girl say before plaintiff, a few minutes after the accident, that plaintiff had weak ankles, which gave way and caused her to fall, and that plaintiff, who was crying and standing by, said nothing. This was stricken out on plaintiff's motion. Another witness testified to the same facts, without objection or contradiction. Held that, in view of such facts and of the physical and mental anguish of plaintiff, whose arm was broken by the fall, defendant was not materially prejudiced by the error in striking it out. *Caskey v. City of La Belle*, 101 Mo. App. 590, 74 S. W. 113.

(a-5) *Refusal to permit witness to testify that land was omitted from deed by mistake, cured by witness stating another deed corrected the mistake.*

Plaintiff can not complain that the court refused to allow his principal witness to testify that land was omitted from a deed by mistake, when afterwards the witness is allowed to testify that a deed produced on the trial corrected the alleged mistake. *Mulherin v. Simpson*, 124 Mo. App. 610, 28 S. W. 86.

(b-5) *Error in excluding question cured by changing its form.*

Any error in excluding a question put to a railroad superintendent, whether there was anything in the appearance of the broken rod, "from which one could tell whether there was a flaw in it previous to the time when it broke," is cured by allowing him to be asked whether there was "anything in the condition of the iron that would indicate what its condition was at the time it broke." *Cowan v. R. Co.*, 80 Wis. 284, 50 N. W. 180.

(c-5) *Exclusion of evidence which other witnesses supply.*

The exclusion of evidence which is given by other witnesses is harmless. *Ostland v. Porter* (Dak. Sup.), 25 N. W. 731; *Gurby v. Park*, 135 Ind. 440, 35 N. E. 279; *Laib v. Brandenburg*, 34 Minn. 367, 25 N. W. 803.

(d-5) *Exclusion of question as to whether there were not restrictions on the witness's land which affected its value.*

In a proceeding to assess damages for land taken for a park, where a witness for the city testified to the price paid by him for land near that taken, petitioner was not prejudiced by the exclusion, on cross-examination, of a question as to whether there were not restrictions on the witness's land which affected its value, evidence being afterwards introduced as to the nature of such restrictions, and the buyer who examined the title for the witness testifying that he did not regard the witness's title as absolutely clear. *Lyman v. City of Boston*, 164 Mass. 99, 41 N. E. 127.

(e-5) *Excluding answer to question by defendant cured by plaintiff afterwards asking the same questions of same witness.*

Any error in excluding the answers to questions asked by defendant is cured by plaintiff afterwards asking the same questions of the same witness. *Doyle v. R. Co.*, 113 Mo. 280, 20 S. W. 970.

(f-5) *Excluding evidence for contradicting witness cured by subsequent admission of another contradictory statement of the witness.*

Where the court excluded evidence introduced for the purpose of contradicting a witness, without cause, the

error is cured by a subsequent admission, without objection, of another and contradictory statement of the witness. *Kriete v. Myer & Co.*, 61 Md. 558.

(g-5) *Where plaintiff's eyesight was partially destroyed and an operation might remedy, defendant not injured by rejecting evidence that plaintiff refused to permit the operation.*

Where plaintiff's injuries partially destroyed his eyesight, and evidence was admitted as to whether an operation was practicable and the jury were instructed that he could not recover if the operation could be successfully performed, defendant was not prejudiced by the rejection of evidence that plaintiff refused to permit such an operation. *Craven v. Smith*, 89 Wis. 119, 61 N. W. 317.

(h-5) *Exclusion of evidence is harmless where distinction between it and other evidence is slight.*

The exclusion of evidence is harmless, where the distinction between it and other evidence received is slight and unimportant. *Daniel v. Daniel*, 39 Pa. St. (3 Wright) 191.

(i-5) *Exclusion of evidence where witness had already given same.*

The exclusion of evidence is harmless where the witness has already given substantially the same evidence. *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Barber v. James*, 18 R. I. 798, 31 A. 264.

(j-5) *Refusal to admit postal card in foreign language.*

The refusal of the trial court to admit a postal card written in a foreign language, even if erroneous, does not show prejudicial error authorizing a reversal, when

the contents of such card is not shown on appeal. Frick v. Kabaker, 116 Iowa 494, 90 N. W. 498.

(k-5) *Excluded evidence cured by being treated as in.*

The error of excluding competent testimony may sometimes be cured by treating it as if it were in evidence. Appeal of Smith, 52 Mich. 415, 18 N. W. 195.

(l-5) *Excluding proper evidence which did not prejudice.*

The exclusion of proper evidence will not reverse, where its exclusion did not prejudice the complaining party. R. Co. v. Walters, 120 Ill. App. 152, affm'd, 217 Ill. 87, 75 N. E. 441.

(m-5) *Exclusion of evidence showing bias of witness.*

The exclusion of evidence showing bias of a witness is not reversible error, it appearing that there was sufficient evidence before the jury to enable them to estimate and weigh his testimony. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879.

(n-5) *Refusal to allow plaintiff to answer whether she was willing to submit to an examination of her injuries.*

Where, in an action for injuries to plaintiff, defendant's counsel was permitted to comment on plaintiff's refusal to submit to an examination by reputable physicians, and stated that defendant city would like to know from some other doctors than those who had testified for plaintiff of the plaintiff's condition, etc., defendant was not prejudiced by the court's refusal to allow plaintiff to answer, on cross-examination, whether she was willing to submit to a physical examination as to her injuries. Judgm't, 117 Ill. App. 434, affm'd, City of Chicago v. McNally, 81 N. E. 23, affm'g judgm't, 128 Ill. App. 375.

- (o-5) *Refusal to permit plaintiff to be asked on cross-examination, whether if he had looked he could have seen the open elevator.*

Where, in an action for injuries to one who, on entering defendant's building, fell down an unguarded elevator shaft, he testified that he could have seen everything there was inside the building if he had looked, and that he did not remember seeing certain posts at the corner of the elevator shaft, there was no prejudicial error in refusing to permit him to be asked, on cross-examination, questions as to whether, if he had looked, he could not have seen the open elevator, and whether there were posts at the corners. *Gardner v. Waterloo Cream Separator Co.*, 134 Iowa 6. 111 N. W. 316.

- (p-5) *Excluding copies of books of account, where all those who made the entries were permitted to testify.*

Error, if any, in excluding copies of books of account is harmless, where all persons from whose reports the books are made up were permitted to testify. *Judgm't*, 17 Okl. 344, 87 P. 311, *affm'd*, *Drunn Flats Commission Co. v. Edmissin*, 208 U. S. 534, 28 S. Ct. 367, 52 L. ed. 606; *Copper Bells Mining Co. v. Costello* (Ariz. Sup.), 95 P. 94, rehearing denied, 95 P. 803.

- (q-5) *Refusal to permit witness, testifying to the character of soil, to state what he understood by "hardpan."*

Where a party who traded land was claimed to have misrepresented the soil testified that he was acquainted with the soils in the locality, and knew hardpan when he saw it, and that he had had experience with land of that character, and there was no hardpan on the farm in question, a refusal to permit him to state what he understood by hardpan, and what was hardpan in the locality, was

not such error as to require a reversal of a judgment against him. *Robinson v. Yetter*, 238 Ill. 320, 87 N. E. 363, affm'g judgm't, 143 Ill. App. 172.

(r-5) *Exclusion of evidence that bank ex-president who said he knew indebtedness of R. Co. to bank when note was issued, had in another case denied.*

In an action by a bank on the note of a railroad company, it was shown that the former president of the bank was also secretary and treasurer of the railroad company. The cashier testified to the execution of the note, and that it was given to cover the debt of the railroad company to the bank. The evidence was not contradicted. Held, that the receiver of the railroad was not prejudiced by the exclusion of the evidence that the ex-president of the bank, who testified that he knew the amount of the railroad's indebtedness to the bank when the note was issued, had, in another case, testified that he did not know the amount. *Bank v. R. Co.*, 53 Wash. 528, 102 P. 414.

(s-5) *Excluding answer cured improper question.*

Any error in a question propounded to a witness was cured, where the answer was excluded. *Southern Hardware & Supply Co. v. Standard Equipment Co.* (Ala. Sup.), 51 S. 789.

(t-5) *Improper rejection of evidence not prejudicial.*

The improper rejection of evidence that is not prejudicial is not ground for reversal. *Funk v. Hendricks* (Okl. Sup.), 105 P. 352.

(u-5) *Where the probable answer may be inferred by the jury, its exclusion was harmless.*

Where the probable answer of plaintiff to a question is such as may be inferred by the jury, without an ex-

press statement from him, its exclusion is harmless. Ryan v. R. Co., 209 Mass. 292, 95 N. E. 654.

(v-5) *Excluding evidence under an immaterial issue.*

Any error in excluding evidence under an immaterial issue is harmless. R. Co. v. Edrington (Tex. Civ. App.), 102 S. W. 1171.

(w-5) *In action for breach of marriage promise, exclusion of evidence of defendant's reputation for integrity.*

In an action for breach of marriage promise, the exclusion of testimony as to defendant's reputation for integrity was harmless, where several witnesses had testified that his reputation for chastity and morality was good. Lanigan v. Neely (Cal. App.), 89 P. 441.

(x-5) *Exclusion of petition in action against railroad as evidence, where relator was not harmed.*

In an action to recover the penalty prescribed by Revised Statutes 1899, sec. 1075, requiring railroads to stop at junctions, the exclusion of a petition to compel the production of train sheets, dispatches, records, timetables, etc., did not harm relator, where there was no evidence that there were any passengers or baggage to be transferred on the dates mentioned in the petition, so that a judgment for relator could, in no event, have been sustained. State ex rel. McPherson v. R. Co., 105 Mo. App. 207, 79 S. W. 714.

(y-5) *Exclusion of evidence that house was of bad repute.*

In an action on a policy, one of the defendant's witnesses had testified that the house destroyed was worth \$950, and the verdict returned was only \$851. Held, that defendant could not have been prejudiced by the exclusion of the evidence that the house was of bad repute,

the reason of the offer to prove the reputation of the house having been stated to be that of "affecting its value." *Breckenridge v. Insurance Co.*, 87 Mo. 62.

(s-5) *Error in excluding evidence is harmless when court assumes as true the fact sought to be proved.*

Error in excluding evidence is made harmless by the court assuming as true the evidence sought to be proven. *Asher v. Jones County*, 29 Tex. Civ. App. 353.

(a-6) *Exclusion of evidence in contest in respect to estate of an habitual drunkard.*

In a contest with respect to the estate of an habitual drunkard, the exclusion of evidence tending to show that such drunkard was capable of taking charge of his own affairs was not prejudicial to him, where the decree made by the court was one which was just and proper, and made of the funds transferred the same disposition as the drunkard himself was desirous of making according to the terms of his answer. *Glasser v. Priest*, 29 Mo. App. 1.

(b-6) *Erroneous exclusion cured by subsequent admission of the evidence.*

When the evidence of the defendants is erroneously excluded, if it be subsequently admitted the error is not ground for reversing the judgment. *Deitricks v. R. Co.*, 13 Neb. 361, 13 N. W. 624, 12 Neb. 225, 10 N. W. 718.

(c-6) *On an issue of adverse possession, excluding tax receipts cured by testimony of witness that he paid taxes for defendant.*

On an issue as to adverse possession, if there was error in the exclusion of tax receipts offered in evidence by defendant corporation to prove that it had paid taxes

on certain land, such error was cured by the testimony of a witness that he had paid them for defendant. *Christy v. Spring Valley Water Works*, 97 Cal. 21, 31 P. 1110.

- (d-6) *Error in refusing proof that contract was furnished by plaintiff, rendered harmless where it was shown that agent was acting for both parties.*

Where the plaintiff had testified that the contract and specifications were furnished by the agent employed by the defendants, and defendants had a right to contradict the plaintiff by showing that the contract was furnished by plaintiff, and not by defendant, and to refuse such proof was error; but it is rendered harmless, and not ground for reversal, where it appeared from subsequent testimony for the defendants, that such agent was acting for both parties in pursuance of an understanding between them in furnishing the contract and specifications. *Bryson v. McCone*, 121 Cal. 153, 53 P. 637.

- (e-6) *Refusal to permit introduction of certain letters on the ground that they were privileged communications.*

Where the authority of certain attorneys to represent defendant in respect to a contract was in issue, a statement by plaintiff's counsel, in argument, that such authority might perhaps have been proved by letters that passed between the defendant and the attorney, and that plaintiff tried to get these letters, but defendant's counsel had refused to produce them, upon the ground that they were privileged communications between attorney and client, and the court so rules, and that plaintiff was compelled to resort to other evidence, though perhaps improper, was not reversible error. *Bank v. Thomas Haiz* (Ariz. Sup.), 115 P. 73.

Sec. 85. Expert evidence.

(a) *Expert Testimony that attending physician can best judge as to the nature and character of injuries.* -

Defendant in a personal injury action was not prejudiced by cross-examination of his expert medical witness, which elicited a statement that a physician who attended plaintiff was in a better position to form an opinion of the nature and character of the injuries than one who must form his opinion on a mere hypothetical question. *Robinson v. R. Co.*, 103 Mo. App. 110, 77 S. W. 493.

(b) *Refusal to hear additional expert testimony.*

An erroneous refusal of the court to hear additional expert testimony offered by plaintiff as to the value of services sued for, was not prejudicial to him, where no contradictory evidence on that issue was offered by defendant. *Stewart v. Emerson*, 70 Mo. App. 482.

(c) *Expert testimony as to safe condition of railroad tracks.*

The admission of expert testimony as to what would constitute a safe condition of a railroad track is harmless, when the company is shown to have been negligent in maintaining the grounds in an unsafe condition. *Hurst v. R. Co.*, 163 Mo. 309, 63 S. W. 695, 85 Am. St. Rep. 539.

(d) *Refusal to strike out expert testimony as to reasonable value of legal services.*

Error, if any, in refusing to strike out expert testimony as to the reasonable value of legal services, because, on cross-examination, it appeared that such testimony was based upon an assumption of fact not disclosed to the jury, is not prejudicial, where the jury, by its verdict, finds that the amount of compensation to be paid for such services was fixed by contract, and each witness testified upon the

assumption that the compensation was not so fixed, and it was upon that assumption alone that their testimony was submitted to the jury. (N. M.) Judgm't 82 P. 232, affm'd. Cunningham v. Springer, 204 U. S. 647, 51 L. ed. 662; 9 A. & E. Ann. Cas. 897.

(e) *Erroneous opinion of expert cured by sufficient competent proof.*

On hearing on the merits of a claim against decedent's estate for services rendered, at which there is sufficient competent evidence adduced on the question of the value of the services to support the decree rendered, the erroneous admission of the opinion of one claiming to be an expert, but whose sources of information are limited, will not be regarded as reversible error, the trial being by the court. In the matter of Benton, 71 App. Div. 522, 75 N. Y. Supp. 859.

(f) *Expert testimony as to use of inks.*

In a suit on certificates of deposit, which bore on their face various erasures, one being made with ink different from that used in the other parts of the certificate, while the other was made with a pencil, the admission of expert testimony that the ink used in making the erasure was different from the other was harmless to plaintiff. Sweitzer v. Allen Banking Co., 76 Mo. App. 1.

(g) *Expert testifying that act forbidden by statute is negligence.*

Expert testifying that act forbidden by statute is negligence is harmless. Thompson v. Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298.

(h) *Expert testimony as to space within which a car may be stopped.*

Where a street car which struck deceased was stopped.

within 18 to 20 feet after collision, defendant was not prejudiced by testimony of an alleged expert that a car, with the conditions surrounding it, could be stopped in from 18 to 24 feet. *Ellis v. Metropolitan St. Ry. Co.*, 234 Mo. 657, 138 S. W. 23.

- (i) *Erroneous admission of expert evidence, where the opinions are such that the jury unaided would have found.*

The erroneous admission of expert evidence is not ground for reversal, where the opinions therein expressed are such as the jury would have found without the aid of such evidence. *Fisher v. R. Co.*, 22 Ore. 533, 30 P. 425, 16 L. R. A. 519.

- (j) *Question to expert calling for a conclusion, but answer is an opinion.*

Though the question to an expert witness is objectionable as calling for a conclusion, no prejudicial results follow where the answer of the witness amounts strictly to an opinion, and not to a conclusion. *Thomas v. R. Co.*, 125 Mo. App. 131, 100 S. W. 1121.

- (k) *Permitting expert witness to state depreciation in value of property, instead of the value before and after improvement.*

In an action against a city for damages caused plaintiff's property by a change in a street grade, defendant was not prejudiced by the action of the court in permitting expert witnesses, all of whom were qualified, to testify in respect to the value, to state the amount of the depreciation in the market value of the property, instead of stating the value before and after the street improvement was made. *Hempstead v. Salt Lake City* (Utah Sup.), 90 P. 397; *Felt v. Same*, Id. 402.

(l) *Improper evidence of medical expert unaffecting jury.*

Where, in an action against a city for injuries from a defective sidewalk an expert medical witness, after testifying that two of defendant's ribs were fractured, and, as a result thereof, there was a thickening between the ribs and the cartilage, and further testimony by him that plaintiff was more likely to suffer from the effects of the injury by exposure to cold than if sound and well, though improperly admitted, was not ground for reversal, since it being a matter of common experience which could not have influenced the jury in determining plaintiff's damages. *City of Pittsburg v. Broderson*, 10 Kan. App. 430, 62 P. 5.

(m) *Error in the form of question to expert did not result prejudicially to objector.*

An expert can not properly be asked whether a structure is a safe one, or whether certain methods are prudent; but facts may be elicited from the witness from which such conclusion inevitably follows, and where the question asked of an expert witness is objectionable in form, yet, if the answer of the witness gives facts in full, and explains what methods would have been safe, and all information given by him might have been obtained by proper questions, and it appears that the negligence of the defendant was fully proved by other evidence, the error in the form of the question is not prejudicial. *Giraudi v. Electric Imp. Co. of San Jose*, 107 Cal. 120, 48 Am. St. Rep. 114, 40 P. 108.

(n) *Refusal to permit a physician to answer, on cross-examination, whether he was employed as an expert to be paid out of recovery.*

In an action against a street railroad company for injuries received by plaintiff while attempting to drive across the railroad track, a physician who testified for plaintiff as to his injuries, was asked on cross-examination whether he was

employed as an expert witness, under an arrangement that he was to be paid out of the recovery in the cause, and an objection was sustained. The evidence of the physician did not differ materially from that of three other physicians, two of whom had been appointed by the court to make a physical examination of plaintiff. Held, that the refusal to allow the physician to answer the question was not injurious to defendant. *Indiana Union Traction Co. v. Pheanis*, 43 Ind. App. 653, 85 N. E. 1040.

(o) *Admission of expert evidence where jury must have reached the same conclusion.*

Where the jury, upon the undisputed evidence, must have reached the same conclusion as an expert witness, or where his evidence is on a point on which the jury are entirely competent to decide, in accordance with the general experience, the admission of expert testimony will not be regarded as ground for reversal. *Puget Sound Electric Co. v. Van Pelt* (Wash.), 168 F. 206.

(p) *Allowing an expert witness to testify to alcohol and water in Peruna.*

In an action on a bond given under the liquor tax law (Con. Laws, chap. 34), by defendants holding a liquor-tax certificate as licensed pharmacists, entitling them to sell liquor, on prescriptions of a physician and alcohol for medical purposes, in which the breach claimed the sale of six pint bottles of Peruna to one person, which it was claimed was liquor, and defendants contended that it was a proprietary medicine, and an expert witness for plaintiff testified that the Peruna sold contained about twenty-seven per cent of alcohol and seventy-three per cent of water, allowing him to state the percentage of alcohol in standard whiskey, decanter wines and lager beer, was harmless, since the amount of alcohol in the mixture was not controverted; but the contention of defendants was, that the drugs therein

made it a proprietary medicine in the treatment of diseases, without which it was clearly a liquor. *Clement v. Dwight*, 121 N. Y. Supp. 788, 137 App. Div. 389.

(q) *Where common laborer was injured by the explosion of a steam pipe, testimony of expert that such laborer would not know the danger of working on a steam pipe.*

Where a common laborer, who was injured by the explosion of a steam pipe upon which he was working, had testified that he had no knowledge of the working of steam, testimony by an expert that a common laborer would not know the danger in working on a pipe into which the steam had been turned, was not prejudicial. *Yellow Pine Paper Mill Co. v. Lyons* (Tex. Civ. App.), 159 S. W. 909.

(r) *Permitting question to expert, whether he desired to impress the jury with the belief that plaintiff was "faking."*

Defendant, in an action for personal injuries, held not prejudiced by a question on cross-examination of one of its experts, whether he desired to impress the jury with the belief that the plaintiff was "faking." *Firebee v. R. Co.* (N. C. Sup.), 83 S. E. 30.

(s) *Expert witness asked if he was not employed by insurance company.*

Where an expert witness for defendant in a negligence case testified, on cross-examination, that he expected to be paid for his services, and in disregard of instructions of the court, counsel for plaintiff asked him if he was not employed by an insurance company, not a party to the action, which question the court charged the jury not to consider, and the witness had answered that he knew nothing of the insurance company in the case. Held, that no sufficient ground for setting aside the verdict for plaintiff existed.

Shaler v. Broadway Imp. Co., 22 App. Div. 102, 47 N. Y. Supp. 815, aff'd 162 N. Y. 641.

(t) *General comment in a charge disparaging the value of expert testimony.*

A mere general comment in a charge, disparaging the quality and value of expert testimony, is not ground for reversal. Berkley v. Maurer, 34 Pa. Super. Ct. 363.

(u) *Instruction that expert testimony should be considered with caution, and when they testify from personal knowledge their testimony should be considered as that of other witnesses.*

Where, in a personal injury action, experts testified to the physical condition of plaintiff as it appeared to them from a physical examination, the error in an instruction, that though it was proper to consider expert testimony, the same should be considered with caution, and that when experts testify to matters from their personal knowledge, their testimony should be considered the same as that of any other witness testifying from personal knowledge, was not prejudicial, for it must have appeared to the jury that the testimony of the experts must be given the same consideration as should be given to other witnesses testifying from personal knowledge. Maiden v. Saylor Coal Co., 133 Iowa 699, 111 N. W. 57.

Sec. 86. Failure to pass on objections to evidence.

(a) *Plaintiff can not object to the court's failure to pass on defendant's objections to evidence.*

Where the record shows that evidence offered by plaintiff was admitted subject to defendant's objections, plaintiff can not complain of the subsequent failure of the court to rule on the objections. Meserve v. Pomona Land, etc., Co. (Cal. Sup.), 34 P. 508, 509.

Sec. 87. Fires.

- (a) *In action for injuries to wood-lot by fire, admission of evidence showing cost of restoring land to its previous condition.*

In an action for injuries to a wood-lot by fire, the erroneous admission of evidence showing the cost of restoring the land to its previous condition held harmless, where it manifestly did not prejudice defendant. *Mahaffey v. R. Co.*, 229 Pa. 285, 78 A. 143.

- (b) *Expression of opinion as to origin of fire.*

Where the jury were authorized by the evidence to believe that the fire in controversy occurred by reason of defendant's negligence, witnesses' expressions of opinion as to the origin of the fire were without prejudice. *R. Co. v. Plummer*, 18 Ky. L. R. 228, 35 S. W. 1113.

- (c) *Instruction that if jury believed from the evidence that plaintiff's property was destroyed by fire emitted from a defective locomotive, they should find for plaintiff.*

Where, in an action against a railroad for burning plaintiff's building, there was no evidence of a defect in the engine except in the spark arrester, and evidence of that defect was circumstantial, an instruction that, if the jury believed from the evidence that plaintiff's property was destroyed by fire emitted because of a defect in defendant's locomotive, the jury should find for plaintiff, though objectionable as pretermittting inquiry as to whether or not the defect in the engine contributed to the burning of the building, was not prejudicial to defendant. *R. Co. v. Sherrill* (Ala. Sup.), 44 S. 631.

- (d) *In an action for damages from fire by locomotive, refusal to charge that jury was not bound by valuation of the property as testified by witnesses.*

In an action against a railroad for damages from fire started by a locomotive, refusal of a request to charge that the jury were not bound by the valuation of the property as testified to by witnesses was not prejudicial to defendant, where the jury found for plaintiff much less than the estimated value of the property according to the testimony of any witness. *R. Co. v. Sumner* (Ga. Sup.), 68 S. E. 593.

Sec. 88. Hearsay evidence.

- (a) *Admission of hearsay evidence tending to impugn good faith of plaintiff steamboat company in opposing order to change its landing place.*

In an action to restrain the State Harbor Commissioners from enforcing an order requiring plaintiff steamboat company to change its landing place, the admission of hearsay evidence tending to impugn its good faith in opposing the order of removal is harmless, if the court finds that the order is unreasonable. *Union Trans. Co. v. Bassett* (Cal. Sup.), 46 P. 907.

- (b) *Noncommittal answer to question calling for hearsay.*

In an action against a bank for damages to plaintiff's business and credit consequent on the bank's refusal to honor his checks, a witness was asked if he understood from any source, or in any way, or whether he got information from anyone that the credit plaintiff had in his stock business was on account of the defendant furnishing him money, and whether plaintiff's credit in that community was based upon that fact, and replied that he might have heard it indirectly, but he did not know, it might have had something to do with it. Held that, neither the questions nor answers could

have worked plaintiff any hurt, as the witness showed wholesale ignorance on the subject. *Roe v. Bank*, 167 Mo. 406, 67 S. W. 303.

(c) *Improper but harmless admission of hearsay.*

Where, in an action against a railway for injuries at a street crossing, defendant's engineer, who had charge of the engine, testified that the train was late, the admission of the testimony of a passenger that the station agent at a station near the place of accident told him in reply to an inquiry, that the train was 23 minutes late, if hearsay, was harmless. *Haines v. R. Co.*, 129 Mich. 475, 89 N. W. 349, 8 D. L. N. 1035; *Donnell v. Clark*, 12 Kan. 154; *Harlem v. Moore*, 132 Mo. 483, 34 S. W. 70; *Fraysher v. R. Co.*, 66 Mo. App. 573; *City of Columbia v. Johnson*, 72 Mo. App. 232; *Brady v. Springfield Traction Co.*, 140 Mo. App. 421, 124 S. W. 1070; *Brooks v. Jordan*, 14 Mont. 379, 36 P. 450; *Piper's Appeal*, 20 Pa. 67.

(d) *Refusal to strike hearsay not prejudicial.*

In an action for personal injuries, where the plaintiff testified that one claiming to be the defendant's physician had stated it was a bad sprain, and the court refused to strike out the statement as hearsay and an unauthorized admission, the ruling was harmless, where other undisputed evidence clearly showed that such injuries were suffered. *Musick v. United Rys. of St. Louis*, 155 Mo. App. 64, 134 S. W. 31; *Smallwood v. City of Tipton*, 63 Mo. App. 234.

(e) *Hearsay on undisputed fact was immaterial.*

Admission of hearsay having bearing exclusively on a fact that is undisputed is harmless. *Matthews v. Wallace*, 104 Mo. App. 96, 78 S. W. 296; *Hartpence v. Rodgers*, 143 Mo. 623, 45 S. W. 650.

- (f) *Where witness was asked if he knew owners were offered \$12,000 for land before road was built, answered, "I understood so, but it don't make any difference in the worth of it," refusal to strike answer as hearsay.*

A witness who had testified on behalf of the owners of the land, part of which was taken for a railroad, of the value of the land before and after the railroad was built, was asked, on cross-examination, if he did not know that the owners had offered it for sale, before the railroad went through for \$12,000, and answered, "I understood so, but it don't make any difference in the worth of it." Held, that a refusal to strike out such answer as hearsay was not such error as would work a reversal of the judgment. *Watson v. R. Co.*, 57 Wis. 332, 15 N. W. 468.

- (g) *Hearsay evidence concerning the boundary of land.*

In ejectment the defendant, under objection, proved what a third person had said in conversation concerning the boundary of the land. This was assigned as error. It appeared from the verdict that the evidence in question had been disregarded by the jury. Judgment affirmed. *Sergeant v. Ford*, 2 Watts & S. (Pa.) 122.

- (h) *Admission of hearsay cured by party explaining his refusal to answer interrogatories.*

The error, if any, in admitting hearsay evidence to prove that a party refused to answer interrogatories propounded by the adverse party, is harmless, where the party was permitted to explain his refusal. *Berry v. Joiner* (Tex. Civ. App.), 101 S. W. 289.

- (i) *Permitting hearsay evidence as to weight of goods.*

Error in permitting evidence of weight of goods was harmless, where accounts of sales showing the weights were

introduced in evidence. *R. Co. v. Daniel & Burton* (Tex. Civ. App.), 133 S. W. 506.

(j) *Permitting hearsay to remain in the record cured by charge to the jury.*

Permitting testimony of a witness as to a fact to remain in the record, subject to objection, although he admitted on cross-examination that his statement was based upon hearsay only, was not reversible error, where the jury were expressly instructed that such testimony was incompetent and should not be considered. (*Wash.*) *Puget Sound Nav. Co. v. Lavender*, 160 F. 851, 87 C. C. A. 655.

Sec. 89. Hypothetical questions and answers.

(a) *Improper hypothetical questions to medical experts.*

The court will not reverse a judgment for personal injuries because of improper hypothetical questions put to medical experts, for the sole purpose of proving the permanency of the injuries, where the verdict is so small as to render it evident that the jury had not found the injuries to be permanent. *R. Co. v. Buckner*, 39 Neb. 83, 57 N. W. 749.

(b) *Improper hypothetical question to physician answered by statement that decedent's death was caused by an electric shock.*

Where, in an action for death by electric shock, the undisputed evidence showed that decedent was killed by an electric current from a guy wire communicated to it from defendant's wire, the error in allowing an improper hypothetical question to a physician, answered by a statement that the cause of decedent's death was an electric shock, was not prejudicial. *Lamoe v. Superior Water, Light & Power Co.* (*Wis. Sup.*), 132 N. W. 623.

- (c) *Striking out hypothetical questions and answers, after they had been received cured error.*

The striking out of answers to hypothetical questions, after they had been received, cured errors in receiving them. *Roche v. Baldwin*, 135 Cal. 522, 65 P. 459.

- (d) *Where two improper hypothetical questions are answered covering correctly two proper excluded, there is no prejudice.*

Where a medical expert is permitted to answer two improper hypothetical questions fully covering the whole case, is not permitted to answer two proper hypothetical questions, which imperfectly enumerates the two he answers, there is no prejudice. *Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668.

- (e) *Permitting expert witness to express opinion in answer to hypothetical question.*

Error in allowing an expert witness to testify as to his opinion based upon facts included in a hypothetical question, and on reading the evidence in a former trial, was harmless where, on an extended examination, there could be no doubt in the jury's mind that the professional opinion of the witness was based on the facts involved or testified to on the second trial. *Commercial Travelers' Mut. Acc. Ass'n of America v. Fulton* (N. Y.), 93 F. 621, 35 C. C. A. 493.

- (f) *Instruction cured hypothetical question which assumed facts not proved.*

The error in allowing a hypothetical question, assuming facts not proved, was cured by an instruction that the answer should not be considered, if there was a failure to prove any of the material facts assumed by the question to be true. *Tipton Light, Heat & Power Co. v. Newcomer*, 33 Ind. App. 42, 67 N. E. 548; *Thomas v. Dablement*, 31 Ind. App. 146, 67 N. E. 463.

Sec. 90. Illegal or incompetent evidence.*(a) Incompetent evidence on undisputed fact.*

Admission of incompetent evidence bearing exclusively on a fact that is undisputed is harmless. Nat. Masonic Acc. Ass'n v. Sparks (Iowa), 83 F. 225, 28 C. C. A. 399; Milliken v. Maund, 110 Ala. 332, 20 S. 310; Supreme C. I. O. of Heptasophs v. Miles, 92 Md. 113, 48 A. 845, 84 Am. St. Rep. 528; R. Co. v. Thompson, 82 F. 720, 27 C. C. A. 333; Pickles v. City of Ansonia, 76 Conn. 278, 56 A. 552; Prosser v. Hartley, 35 Minn. 340, 39 N. W. 156; Battle v. Bonawell, 107 Ga. 128, 32 S. E. 838; Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404; Abel v. Strimple, 31 Mo. App. 86; Lee v. Dom, 73 N. H. 101, 59 A. 374; Goldberg v. R. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. Rep. 899.

(b) Admitting incompetent evidence to contradict the same.

The admission of incompetent evidence to contradict other incompetent evidence is harmless. R. Co. v. Palmer (Pa.), 127 F. 956, 62 C. C. A. 588; Harner v. Town of Wethersfield, 67 Conn. 533, 35 A. 503; Brock v. Weiss, 40 Ore. 80, 66 P. 575.

(c) Incompetent evidence of no value in determining the issue.

The reception of incompetent evidence does not constitute reversible error where the evidence as to the substantial facts was fully developed, and the jurors could have had no trouble in seeing that such evidence was of no value. Chouteau v. Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467; Hume v. Hale, 146 Mo. App. 659, 125 S. W. 871; Kleimann v. Giesselman, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761; Fisk, M. & M. Co. v. Reed, 32 Col. 506, 77 P. 240; (Col.) Portland Gold Min. Co. v. Flaherty, 111 F. 312, 49 C. C. A. 361; Corcoran v. Poncini, 35 Ill. App. 130;

R. Co. v. Jones, 1 Ind. Ter. 354, 37 S. W. 208; Woolsey v. Jackson, 3 Ind. Ter. 597, 64 S. W. 548; Brayley v. Ross, 33 Iowa 305; Courtwright v. Strickler, 37 Iowa 382; Comstock v. Smith, 20 Mich. 338; La Duke v. Exeter Tp., 97 Mich. 450, 56 N. W. 851, 37 Am. St. Rep. 357; Shane v. Shearsmith's Est., 137 Mich. 32, 100 N. W. 123, 11 D. L. N. 186, 222; McCullough v. R. Co., 101 Mich. 234, 59 N. W. 618; Hall v. U. S. Radiator Co., 76 App. Div. 504, 112 St. Rep. 549, 78 N. Y. Supp. 549; Green v. R. Co., 5 O. C. C. n. s. 497, 16 O. C. D. 609; Etna Indemnity Co. v. Ladd (Ore.), 135 F. 636, 68 C. C. A. 274, affm'g judgm't C. C. 128 F. 298, writ of error denied, 199 U. S. 606; Salt Lake Foundry & Machine Co. v. Mammoth Min. Co., 6 Utah 351, 23 P. 860; Kirkland v. Telling, 49 Wis. 634, 6 N. W. 361; Kelly v. R. Co., 80 Wis. 328, 50 N. W. 187.

(d) *Incompetent evidence cured by fact established by competent.*

Admission of incompetent evidence may be disregarded if it appears that the fact in question was abundantly established by other competent evidence. Bogue v. Newcomb, 1 T. & C. 251, affm'd 58 N. Y. 674; Matter of Bernsee's Will, 71 Hun 27, 53 St. Rep. 872, 24 N. Y. Supp. 504, aff'd 141 N. Y. 389, 57 St. Rep. 601; Jones v. Malvern Lumber Co., 16 Ark. 296; Rosewater v. Schwab Clothing Co., 58 Ark. 446; Walker v. Walker, 7 Ark. 542; Tyson v. Chestnut, 118 Ala. 387, 24 S. 73; Boyd v. Boyd, 163 Ill. 611; R. Co. v. Kennally, 170 Ill. 508; Williamson v. Ohremus, 67 Ill. App. 341; Adams v. Hughes, 78 Ill. App. 252; Peters v. Borneau, 22 Ill. App. 177; Fast v. McPherson, 98 Ill. 496.

(e) *Incompetent evidence which becomes admissible for another purpose during the trial.*

The admission of evidence, while incompetent for the purpose and at the time at which it was admitted, was

competent for another purpose, and might have been introduced at another time at the trial, is not reversible error. *Farley v. Pettes*, 5 Mo. App. 262; *Insurance Co. v. Sailer*, 67 Pa. 108.

(f) *Incompetent evidence as to forfeited recognizance.*

Where a forfeited recognizance bore the official indorsement of the court thereof accepting and was in the possession of the clerk, the indorsement was conclusive of such fact, though the bond had not been marked "filed" by the clerk; and hence, evidence of the judge that he accepted and approved the recognizance and delivered the same to the clerk, and evidence of the clerk that he placed the recognizance in a box in his office, though incompetent, was harmless. *State v. Ballentine*, 106 Mo. App. 190, 80 S. W. 317.

(g) *Incompetent evidence admitted, without objection, has its natural probative effect.*

Incompetent evidence admitted without objection has its natural probative effect. *Thomas v. Ackerman*, 21 O. C. C. 740, 12 O. C. D. 456.

(h) *Where inadmissible evidence has been given by both parties without objection, admission of further similar evidence.*

Where inadmissible evidence has been given by both parties without objection by either, the admission of further similar evidence on the same subject was not prejudicial error. *Coppock v. Lampkin*, 114 Iowa 664, 87 N. W. 665; *Chambers v. Chester*, 172 Mo. 46, 72 S. W. 904.

(i) *Incompetent evidence, where party had a right to perform the act in question.*

The admission of incompetent evidence to prove the official capacity of one seeking to justify an act, on the ground that he was an officer and exempt from personal liability, is

harmless, where the act was one which he had the legal right to perform as a private person. *Willis v. Sproule*, 13 Kan. 257.

(j) *Sustaining objection to question immaterial if answer sought is given to other questions.*

Sustaining an objection to a question is not reversible error, if the answer is subsequently obtained by other questions. *R. Co. v. Spencer*, 93 Tenn. 173, 23 S. W. 211.

(k) *Testimony of incompetent witness as to depreciation in value of a machine.*

In trover for the value of a machine seized and sold by defendant under an insecurity clause of a chattel mortgage, the testimony of an incompetent witness that the depreciation from one season's use would not exceed \$400, was not prejudicial to defendant, where it appeared that the price of the machine was \$1,800, that plaintiff had paid over \$1,000, and had used the machine only one season when defendant seized it; that the latter bought it in for \$1,000, and resold it for \$1,400, and that plaintiff had judgment for \$192.50. *Woods v. Gahr, Scott & Co.*, 99 Mich. 301, 58 N. W. 307.

(l) *Inadmissible evidence, constituting the sole defense, does not preclude a peremptory instruction for plaintiff.*

Inadmissible evidence constituting the sole defense and erroneously let in over objection, does not preclude a peremptory instruction for plaintiff, since, though technically erroneous, the proceeding is not prejudicial. *Erie City Iron Works v. Miller Supply Co.* (W. Va. Sup.), 70 S. E. 125.

(m) *Inadmissible evidence afterwards excluded.*

Admission of inadmissible evidence is harmless where it is afterwards excluded. *McFarlane v. Pierson*, 21 Ill. App. 566; Cf. *Daily v. Daily*, 64 Ill. 329.

- (n) *Incompetent evidence cured by instruction to consider as established transaction sought to be impeached thereby.*

Error in the admission of incompetent evidence may be cured by an instruction to consider as an established fact the transaction sought to be impeached by the incompetent evidence. *O'Connor v. Padgett* (Neb. Sup.), 116 N. W. 1131.

Sec. 91. Immaterial evidence.

- (a) *Admission of immaterial evidence not reversible error.*

The admission of immaterial evidence will not reverse, unless harm appears to have resulted. *Gurnea v. R. Co.*, 157 Ill. App. 331; *Hogestrom v. R. Co.*, 78 Ill. App. 574; *Maxwell v. Shirt*, 27 Ind. App. 320, 61 N. E. 754, 87 Am. St. Rep. 268; *Huber Mfg. Co. v. Blessing* (Ind. App.), 99 N. E. 132; *St. Peter v. Iowa Telephone Co.* (Iowa Sup.), 131 N. W. 2; *Zilke v. Johnson* (N. D. Sup.), 132 N. W. 640; *Cole v. Maxfield*, 13 Minn. 233 (Gil. 220); *Brown v. W. U. Tel. Co.*, 92 S. C. 354, 73 S. E. 542.

- (b) *Immaterial evidence as to draining a ditch.*

In an action for negligently constructing a ditch across plaintiff's land to straighten a stream and drain land in another district, whereby stagnant water was left in the old bed of the stream on plaintiff's land, to his damage, evidence was admitted, over his objection, as to the condition of the stream before the ditch was constructed, and as to the successful working of the ditch in draining the land in such district. Held, that such evidence was immaterial but not prejudicial to plaintiff. *Bungenstock v. Nishnabotna Draining Dist.*, 163 Mo. 198, 64 S. W. 149.

- (c) *Immaterial evidence immediately stricken out.*

The admission of immaterial evidence is not cause for reversal, where it was immediately stricken out and excluded

from the jury, excepting that portion of it which was already in evidence and was not controverted. *Ry. Co. v. Masch*, 163 Ill. 305.

(d) *Immaterial evidence unaffecting substantial rights.*

This court will not reverse a judgment simply for the reason that immaterial evidence was introduced on the trial. It must appear that such evidence was legally prejudicial to the party's rights, or calculated to have an injurious influence upon the minds of the jury, and to mislead them in their endeavors to arrive at a correct conclusion. *Nickels v. Mooring*, 16 Fla. 76.

(e) *Use of exemplars by witnesses not material if afterwards proved to be genuine.*

Use of exemplars by witnesses which had not been truly proved to be genuine signatures, is not material, if exemplars were subsequently proved to be genuine by uncontroverted evidence. *Estate of Marchall*, 126 Cal. 95, 58 P. 449.

(f) *Admitting oral evidence as to letter not shown to have been lost was immaterial.*

Where, in an action for the price of property sold, a letter written by defendant to the former owner of the property was not shown to have been lost, but a witness was permitted to state that the letter was an offer by defendant to purchase the property for a greater sum than she had contracted to pay plaintiff, the error was harmless since the testimony was immaterial. *McLeod v. Barnum*, 131 Cal. 605, 63 P. 924.

(g) *Immaterial evidence harmless if the facts are afterwards established by proper evidence.*

The admission of oral evidence of a written contract is harmless, if the facts were afterwards established by proper evidence. *Jones v. Tallant*, 90 Cal. 386, 27 P. 305.

(h) *Immaterial evidence cured by instructions to jury to disregard it.*

The admission of immaterial evidence is harmless, when the instructions to the jury have clearly indicated that it could not be considered upon the only question as to which its admission might do harm. *Sunset Telephone & Tel. Co. v. Day* (Wash. Sup.), 70 F. 364, 17 C. C. A. 164.

(i) *Immaterial that court limited competency of defendant's testimony; as a witness he might have been examined as to all.*

It is immaterial that the court held that the testimony of defendant in another case was competent against plaintiff only for the purpose of impeaching defendant's credibility as a witness, when defendant, being a witness, might have been examined as to all matters covered by the excluded evidence. *Monaghan Bay Co. v. Dickson*, 39 S. C. 146, 17 S. E. 696, 39 Am. St. Rep. 704.

(j) *When competent evidence becomes immaterial under instructions its exclusion is not error.*

When competent evidence becomes immaterial under the instructions which were favorable to the party offering it, its exclusion is not error. *Relfe v. Wilson* (N. Y.), 131 U. S. (appendix) clxxxix.

(k) *Permitting defendant to testify that he had agreed to pay for the land, on purchasing from third person, was immaterial.*

Where, in an action involving the issue, whether plaintiff or defendant was entitled to the land, it was found that defendant was in the lawful possession thereof, the error, if any, in permitting the defendant to testify that he had agreed to pay for the land on purchasing it from a third person, since deceased, was immaterial. *Fonner v. Johnson*, 78 N. Y. 617.

Sec. 92. Impeaching evidence.

- (a) *Improperly receiving impeaching testimony will not reverse.*

Where, in an action tried to a court, impeaching testimony is improperly received without a proper preliminary inquiry of the witness sought to be impeached, and such witness afterwards goes on the stand and has full opportunity of explaining or contradicting the impeaching testimony, the error will not justify a reversal. *Dresher v. Corson*, 23 Kan. 313.

- (b) *Admitting evidence of misdemeanor to impeach plaintiff did not materially affect the merits of the case.*

Judgment will not be reversed for error in admitting evidence of a misdemeanor to impeach plaintiff, where the question of defendant's negligence was properly submitted, and it appears that such admission did not materially affect the merits. *Gardner v. R. Co.*, 135 Mo. 90, 36 S. W. 214.

- (c) *Evidence of character of persons not assailed was harmless.*

In an action of ejectment the plaintiff, to prove that the conveyance to him under which he claimed was bona fides, and to support testimony to that effect, asked the witness what were the characters of certain persons who were present at the settlement. No evidence on this subject had been introduced by defendant. The court admitted the evidence, which was that their characters were fair. The admission of this testimony was assigned as error. Held that, as the law presumed their characters till attacked to be what they were in fact testified to be, the error was harmless. *Postens v. Postens*, 3 Watts & S. (Pa.) 127.

- (d) *Cross-examination of witness as to whether he had been impeached was harmless error.*

Where, on cross-examination, a witness testified that he

had not been impeached in previous suits, and denies that on one occasion he asked a man if he was going to swear that he (witness) had a bad reputation for veracity, and no effort is made to contradict him on the last point, the admission is harmless error. *Mears v. Cornwall*, 73 Mich. 78, 40 N. W. 931.

(e) *While error to admit testimony of notary public to impeach a certificate of acknowledgment made by him, it is harmless where his evidence contains as much to sustain as to overthrow his act.*

It is error to admit the testimony of a notary public to impeach a certificate of acknowledgment made by him; but where the evidence given by him contains as much to sustain his certificate as to overthrow it, the error in admitting his evidence is harmless. *Shapleigh v. Hull*, 21 Col. 419, 41 P. 1108.

Sec. 93. Improper evidence.

(a) *Improper evidence to prove immaterial facts.*

A reversal will not be granted because of the admission of improper evidence to prove a fact wholly immaterial in the determination of the case. *Foster v. Nowlin*, 4 Mo. 18; *Gill v. Dunham* (Cal.), 34 P. 68; *German Savings, etc., Soc. v. Collins*, 145 Cal. 192, 78 P. 637; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Barnett v. Gluttin*, 3 Ind. App. 415, 29 N. E. 154; *Pichon v. Martin*, 35 Ind. App. 167, 73 N. E. 1009; *R. Co. v. Little*, 19 Kan. 267; *Girandel v. Mindeburne*, 3 Martin (La.) n. s. Rep. 509; *Illingworth v. Greenleaf*, 11 Minn. 235 (Gil. 154); *Boosalis v. Stevenson*, 62 Minn. 193, 64 N. W. 380; *Ansley v. Hart*, 77 Ga. 42; *Jewett v. Stevens*, 6 N. H. 80; (Ore.) *Holmes v. Goldsmith*, 147 U. S. 150, 37 L. ed. 118, aff'm'g *Goldsmith v. Holmes*, 36 F. 484, 1 L. R. A. 816; *Stephenville Oil Mill v.*

McNeill (Tex. Civ. App.), 122 S. W. 911; Cannon v. Insurance Co., 53 Wis. 585, 11 N. W. 11. Improper evidence not calculated to enlist the sympathies of the jury, R. Co. v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106. Improper evidence harmless when party recovering entitled thereto, Harvey v. Alturas Gold Mining Co., 3 Ida. 510, 31 P. 819. Improper evidence harmless to complaining party, The Delta v. Walker, 24 Ill. 233; Wheeler v. Shields, 2 Scam. (Ill.) 348; Bannon v. Cowles, 51 Ill. 380. Improper evidence which operates only to rebut improper evidence, Taylor v. Boggs, 20 O. S. 516. Allowing plaintiff to answer improper question was harmless, Hand v. Scodelletti, 128 Cal. 174, 61 P. 373. Sustaining objection to question harmless where defendant could not have derived advantage from any answer that could have been given, Nixon v. Goodwin (Cal. App.), 85 P. 169. Improper parol evidence when party depends on construction of written contract was harmless, Lowler's Case, 109 Ala. 169, 19 S. 396. Admission or rejection of evidence which could not have affected the result, Williams v. Scott, 70 Ill. App. 51; Howard v. Tedford, 70 Ill. App. 660. Improper evidence of matters of common knowledge, State v. Smith, 46 Iowa 670; Kline v. R. Co., 50 Iowa 656. Improper evidence not influencing the result, Amsden v. R. Co., 13 Iowa 132; Holt v. Brown, 63 Iowa 319. Improper evidence not considered by the jury, Bracken Lumber Co. v. Scanlon-Gipan Lumber Co., 78 Minn. 438; Same v. Jefferson, Id. Improper parol evidence where objector broke contract, Kriling v. Cramer, 152 Mo. 431, 133 S. W. 655. Improper, immaterial or irrelevant evidence which did not influence verdict, Loomis v. Stewart (Tex. Civ. App.), 24 S. W. 1078. Error in the admission of testimony which did not injure, Stafford v. Hornbuckle, 3 Mont. 485; Madden v. Head, 1 Lea (Tenn.) 664; Turner v. State, 89 Tenn. 549, 15 S. W. 838.

- (b) *Erroneously admitted evidence harmless where, if excluded, other party would have recovered under permissible proof.*

Erroneously admitted evidence is harmless where, had the evidence been excluded below, the other party would have recovered under parol evidence which would then have become admissible. *Chew v. Beall*, 13 Md. 348.

- (c) *Improper evidence harmless when facts established by other proper evidence.*

The admission of improper evidence is harmless, if the facts were afterwards established by proper evidence. *R. Co. v. Cain*, 81 Md. 87, 31 A. 801, 28 L. R. A. 688; *Turbull v. Maddux*, 68 Md. 579, 13 A. 334; *Webb v. Barling*, 81 U. S. (14 Wall.) 406, 20 L. ed. 774; *Cooper v. Coates*, 88 U. S. (21 Wall.) 605, 22 L. ed. 481; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U. S. 264, 30 L. ed. 967; *Turner v. McIlhenny*, 8 Cal. 575; *Galvin v. Palmer*, 113 Cal. 46, 45 P. 172; *Butler v. Elliott*, 15 Conn. 187; *R. Co. v. Anderson*, 26 Fla. 425; *Mayer v. Wilberger*, Ga. Dec. 20; *Stephens v. Crawford*, 1 Ga. (1 Kelly) 574, 44 Am. Dec. 680; *R. Co. v. Butman*, 22 Kan. 639; *Benton v. Bankey*, 71 Kan. 872, 81 P. 196; *Dickerson v. Wilson*, 25 Ky. (2 J. J. Marsh.) 496; *Stelle v. Faris*, 25 Ky. L. R. 1749, 78 S. W. 868; *Miller v. Schackelford*, 34 Ky. (4 Dana) 264; *R. Co. v. City of Covington*, 4 Ky. L. R. (abst.) 833; *Holmes v. Holmes*, 9 La. 350; *Prince v. Shepard*, 26 Mass. (9 Pick.) 176; *Peebles v. R. Co.*, 112 Mass. 498; *Baeringer v. Nesbit*, 9 Miss. (1 Smedes & M.) 22; *Taylor v. City of Austin*, 32 Minn. 247, 20 N. W. 157; *Hunt v. Desloge Con. Lead Co.*, 104 Mo. App. 377, 79 S. W. 710; *Faye v. Leighton*, 24 N. H. (4 Fost.) 29; *Morrill v. Richey*, 18 N. H. 295; *Wiggin v. Damrell*, 4 N. H. 69; *Krewson v. Purdon*, 15 Ore. 589, 16 P. 480; *McCall v. Brock*, 5 Strob. (S. C.) 119; *Bennet v. R. Co.*, 8 S. D. 304, 66 N. W. 934; *Taylor v. Mallory*, 96 Va. 18, 30 S. E. 472;

Richardson v. Donehoo, 16 W. Va. 685; Ball v. Stewart, 41 W. Va. 654, 24 S. E. 632; Ball v. Kearns, 41 W. Va. 657, 24 S. E. 633; Read v. City of Madison, 85 Wis. 667, 56 N. W. 182; Robbins v. Lincoln, 12 Wis. 1; Sutton v. Hasey, 58 Wis. 556, 17 N. W. 416; R. Co. v. Johnson, 72 Tex. 95, 10 S. W. 325; Herndon v. Casiano, 7 Texas 322. Improper aid to memory of list of personal property lost cured by unassisted evidence, Farrell v. Insurance Co., 66 Mo. App. 153. Improper evidence, but fact otherwise properly established, Bealair v. R. Co., 43 Iowa 662. Error in admitting evidence by one party cured when same practically introduced by adverse party, Darregia v. R. Co., 52 Conn. 285, 52 Am. Rep. 590; Brown v. Penn, McGloin (La.) 265.

(d) *Repetition of erroneous testimony.*

Repetition of erroneous testimony already in the case is not reversible error. Berliner v. Traveler's Insurance Co., 121 Cal. 451, 53 P. 922; Dingley v. McDonald, 124 Cal. 90, 56 P. 790.

(e) *Admission of improper contradicting erroneous evidence.*

The admission of improper evidence to contradict evidence previously erroneously admitted, is not ground for setting aside the verdict. Talburt v. Insurance Co., 80 Ind. 434; Cole v. Town of Cheshire, 67 Mass. (1 Gray) 441.

(f) *Improper evidence, where previously received without objection.*

The failure of the court to exclude certain testimony constitutes harmless error, if no fact was stated in answer to the question to which objection was made, which had not already been stated by such witness in answer to questions to which no objections were made. Chicago Title & Trust Co. v. Sagola Lumber Co., 148 Ill. App. 333, judgment affirmed (Ill. Sup.) 90 N. E. 282.

(g) *Error in admitting evidence cured by charge excluding it.*

Error in admitting evidence is not ground of reversal, where the court, by its charge, excludes from the jury the question to which it relates. *Insurance Co. v. Unsell* (Mo.), 144 U. S. 439, 36 L. ed. 496; *R. Co. v. Madison*, 123 U. S. 524, 31 L. ed. 258; *W. Bank Note & Eng. Co. v. Sleutz*, 188 F. 57, 110 C. C. A. 127; *Coughlan v. Pulson*, 2 MacArthur (D. C.) 308; *Orr v. Garabold*, 85 Ga. 373, 11 S. E. 778; *Harris v. Cable*, 113 Mich. 192, 71 N. W. 531, 4 D. L. N. 284; *Nelson v. Jenkins*, 42 Neb. 133, 60 N. W. 311; *Wynn v. City of Yonkers*, 80 App. Div. 277, 114 St. Rep. 257, 80 N. Y. Supp. 257; *Kling v. R. Co.*, 75 Hun 17, 58 St. Rep. 169, 26 N. Y. Supp. 973, affm'd, 148 N. Y. 739; *Bishop v. R. Co.*, 4 N. D. 336, 62 N. W. 605; *Beggs v. R. Co.*, 75 Wis. 444, 44 N. W. 613. However, there are states which do not uphold this practice as curing the error, *Tourtelotte v. Brown*, 4 Colo. App. 377, 36 P. 73; *R. Co. v. Winslow*, 66 Ill. 219; *City of Chicago v. Brennan*, 61 Ill. App. 247; *Englihood v. Sutton*, 8 Miss. (7 Heming) 99; *Nelson v. Spears*, 16 Mont. 551, 40 P. 785; *Martin v. Perkins*, 67 Vt. 203, 31 A. 148.

(h) *Judgment will not be reversed for erroneous evidence, when same kind introduced by appellants.*

A judgment will not be reversed for error in admission of evidence, where the same kind of evidence is introduced by appellants. *Jaegel v. Johnson*, 148 Cal. 695, 84 P. 175; *Ennis v. R. B. Little & Co.*, 25 R. I. 312, 55 A. 884, re-hearing denied, 25 R. I. 401, 56 A. 110.

(i) *Where final result right, error in admitting improper evidence was immaterial.*

Where the court below improperly overrules a plea which discloses a good defense, and afterwards improperly admits the same defense in evidence under the general issue, on appeal the judgment will not be reversed because the evi-

dence was improperly admitted under the general issue, where it appears from the statement of facts that the result finally attained was in accordance with the law of the case. *Lovering v. McKinney*, 7 Tex. 521.

(j) *In action by married woman, when either she or husband may testify, and both were permitted to testify.*

Where, in an action by a married woman, in which, under Civil Code Practice, sec. 606, either she, or her husband might testify on her behalf, but not both of them, the wife first testified, and on exceptions to the deposition of her husband the court erroneously overruled the objection, without requiring her to elect between her testimony and that of her husband, the error was not prejudicial, the testimony of the wife not throwing any light on the issues involved. *Walker's Assignees v. Walker* (Ky. Ct. App.), 114 S. W. 338.

(k) *Errorous examination of husband as adverse witness against wife.*

In an action to establish a lost deed, it was error for plaintiff to call and examine the defendant's husband as an adverse party, with respect to the interest of his wife in the premises, but the error was harmless, where the husband was afterwards called as a witness by defendant's counsel, and fully examined on the same matter. *Lloyd v. Simons* (Minn. Sup.), 95 N. W. 903.

(l) *Attempt to show, in action for injuries, that pavement was repaired after the accident.*

An attempt to show, in an action to recover for injuries due to a defective sidewalk, that the sidewalk in question was repaired after the accident sued upon, is not ground for reversal, where neither bad faith nor prejudice appears. *Town of Normal v. Bright*, 125 Ill. App. 478, judgment affirmed, 223 Ill. 99, 79 N. E. 90.

- (m) *Defendant not injured by testimony of non-expert witnesses that a guard in front of shaft would make a circular-saw safe.*

A circular saw in defendant's mill, was hung on a shaft, and revolved in an open space in a table. Plaintiff, an employee, was injured by the saw swinging out beyond the edge of the table and striking him. Held, that defendant was not prejudiced by testimony of non-expert witnesses, who had worked about mills a great deal, that a guard should be placed in front of the shaft to prevent its swinging beyond the table edge, without interfering with its use, the jury having been allowed to examine the machine. *Roy Lumber Co. v. Donnelly*, 31 Ky. L. R. 601, 103 S. W. 255.

- (n) *Instruction that it was out of the case cured erroneous admission of understanding of written contract.*

Any possible harm done by the admission of plaintiff's testimony as to how he understood the written contract when he was talking with defendant about what he ought to have for the use of the wall, was cured by an instruction that the written contract was out of the case. *Pireaux v. Simon*, 79 Wis. 392, 48 N. W. 674.

- (o) *Improper evidence that deceased "moaned until he died" cured by instructions to jury.*

In an action to recover damages for the death of plaintiff's son who, while acting as defendant's locomotive engineer, was crushed by the cars of his train, the admission of evidence that deceased "moaned until he died," is not prejudicial error, the jury having been instructed that his physical suffering was not in issue. *R. Co. v. Lester*, 75 Tex. 56, 12 S. W. 955.

- (p) *Improper evidence of impression cured by charge.*

It is not cause for reversal that plaintiff's agent testified

that he would not have loaned money, if the borrower's surety had objected to the alteration of the note for the money loaned, where the court protected defendant from any ill results of such testimony, by stating that only what the parties did, and not the witnesses' impressions were for the consideration of the jury. *Sanders v. Bogwell*, 37 S. C. 145, 15 S. E. 714.

(q) *Improper testimony as to loss of property during suit cured by instruction not to find damages therefor.*

On objection to any testimony as to the loss of the use of the piano sued for pending the suit, the court said, "I will take the testimony subject to the objection, and cover it with a charge if I come to the conclusion that it is not admissible." Held, that the court having, in its instructions, directed the jury to find no damages for any loss of the use of the piano after the commencement of the suit, there was no prejudicial error in the court's action. *Blaisdell v. Scally*, 84 Mich. 149, 47 N. W. 585.

(r) *Improper evidence as to value of stone in a quarry.*

In an action for an overpayment to defendant under a contract to furnish stone, plaintiff assigned as error the admission of testimony as to the value of the stone in the quarry, on the ground that it was irrelevant, though evidence was strong in defendant's favor and the verdict was for him. The evidence objected to did not tend to draw away the minds of the jurors from the point in issue, nor to excite prejudice, nor to mislead them. Affirmed. *Rauch v. Scholl*, 68 Pa. 234.

(s) *Error in allowing plaintiff to testify that the mode of construction commonly called "fireproof" was employed.*

Allowing a plaintiff, in an action for rent, after describ-

ing the construction of the building, to state that that mode of construction is commonly called "fireproof," was rendered harmless by the subsequent introduction of the building law containing the definition of a fireproof building, together with evidence by the plaintiff, without objection or contradiction, that the building was so constructed. *Colorotype Co. v. Williams*, 78 F. 450, 24 C. C. A. 163.

(t) *Error in admitting evidence of driver's discharge after the accident.*

Where, in an action for injuries to plaintiff by a collision with defendant's runaway team, alleged to have been negligently permitted to remain unattended in a street, the evidence establishing the identity of the team as belonging to defendant, and that the horse was left at the curbstone, with the reins thrown over his back and later started to run, and came into collision with the plaintiff's vehicle and caused the injury; such facts warranted a verdict in favor of the plaintiff, and hence, defendant was not prejudiced by a technical error in the admission of evidence that the driver was relieved by defendant of his employment nearly a year after the accident. (*Mass.*) *Armour & Co. v. Skene*, 153 F. 241, 82 C. C. A. 385.

(u) *Erroneous admission of evidence in relation to phosphate.*

Where, in an action for the unpaid part of the price of certain phosphate, defendants pleaded breach of an express warranty of quality, defendants were not prejudiced by the erroneous evidence that the phosphate was not sold by them to their vendees, but was taken by the latter, by reason of the terms of a settlement, the terms of which the answer did not disclose. *Judgm't, Petrified Bone Min. Co. v. Rogers (Pa.)*, 150 F. 445, *affm'd, Rogers v. Petrified Bone Min. Co.*, 158 F. 802, 86 C. C. A. 59.

(v) *Erroneous testimony as to population.*

Session Acts, 1874, p. 63, prescribes the salaries of clerks of courts, and fixes them according to the population of the respective counties according to the last United States Census. In an action by a clerk to recover from his successor fees earned by the former, but collected by the latter, in order to make up the former's salary, the court permitted evidence that plaintiff had been allowed the salary fixed for a certain population to be introduced as evidence that the county had such population. Held, error, but harmless, the population having been shown by the census return. *Lycett v. Wolff*, 45 Mo. App. 489.

(w) *Objectionable testimony, not given in the presence and hearing of the jury, can not be complained of.*

The overruling of objections to questions can not be complained of, the objectionable part of the testimony not having been given in the presence and hearing of the jury. *Renfrew v. Goodfellow* (Mo. App.), 141 S. W. 1153.

(x) *Improper evidence harmless, where jury instructed there is no evidence to prove proposition it relates to.*

The admission of improper evidence is harmless, where the jury was instructed that there is no evidence sufficient to prove the proposition on which the evidence was offered. *Beatty v. Mason*, 30 Md. 409; *Strout v. Hayward*, 37 Mo. App. 585.

(y) *Improper evidence of set-off cured by instruction and finding.*

If, after improper evidence of the furnishing of property as a set-off, in an action of assumpsit, the judge charges the jury that the set-off is inadmissible, and the jury so find, it cures the error. *Conklin v. Parsons*, 1 Chand. (Wis.) 240.

(z) *To constitute reversible error improper evidence must have been both material and prejudicial.*

To be reversible error evidence improperly admitted must have been both material and prejudicial. *Procter v. Blanchard Real Es. & Mfg. Co.*, 75 N. H. 186, 72 A. 210; *Newman v. Mays*, 27 Mo. 520; *Tyrell v. R. Co.*, 7 Mo. App. 294.

(a-1) *Permitting evidence that a card was in appellant's handwriting.*

Any error in permitting evidence that a card was in appellant's handwriting was harmless, where appellant afterwards admitted that the handwriting was his own. *Stewart v. Stewart* (Ind. Sup.), 94 N. E. 564.

(b-1) *Erroneous evidence cured by after evidence which renders it admissible.*

The erroneous admission of evidence which is, at the time inadmissible, is cured by the subsequent introduction of evidence which renders it admissible. *R. Co. v. Hester*, 90 Ga. 11, 15 S. E. 828; *Wueth v. Walzi*, 43 Md. 426; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

(c-1) *Erroneous evidence cured by explanation by court in its instructions to the jury.*

The judgment of the court below will not be reversed because of the erroneous admission of evidence, when the record shows that such evidence was so explained in the instructions of the court to the jury that it worked no prejudice to the appellant. *Woodward v. Horst*, 10 Iowa 120; *Cadman v. Markle*, 76 Mich. 448, 43 N. W. 315, 5 L. R. A. 707; *Seeley v. Garry*, 109 Pa. St. 301.

(d-1) *Admission of erroneous evidence of physicians.*

Laws 1894, chap. 163 (P. L. 246, 1 General Statutes p. 1154, sec. 170), provides that, if it appears from the

record that plaintiff in error suffered manifest wrong and injury in the trial below, whether by the rejection of testimony, or upon the evidence adduced, etc., the appellate court shall remedy such wrong or injury and order a new trial; held, that where opinions of physicians were given, without objection, as to the defendant's mental responsibility, from evidence which they heard, without stating the facts on which the opinions were based, it would be presumed that the jury, as reasonable men, would reject such opinions if the evidence to which the opinions related admitted of more than one construction, and therefore the admission of such evidence was not such manifest injury as would entitle defendant to a new trial. *Malynak v. State*, 61 N. J. L. 562, 40 A. 572.

(e-1) *Evidence, improper for purpose introduced, but admissible for another purpose.*

Though evidence is admitted for a purpose for which it is inadmissible, its admission is harmless if the record shows that it was admissible for another purpose. *Gray v. Borough of Danbury*, 54 Conn. 574, 10 A. 198.

(f-1) *Admission of testimony not responsive to allegations in petition.*

In an action by a servant for personal injuries sustained in being struck by a cable, as a result of a defective pulley attachment, the admission of evidence as to the omissions of defendant supposed to be negligent, in the absence of allegations in the complaint thereto; held harmless error, in view of a requirement of a remittitur of \$3,500 before overruling a motion for a new trial. *Atoka Coal & Mining Co. v. Miller* (Okl. App.), 104 S. W. 555.

(g-1) *Erroneous evidence of market price at point other than fixed by the contract.*

Where an action for breach of contract of sale was tried

to the court, and the court fixed the damages according to the market price of the commodity at the place provided by the contract for delivery, the admission of evidence of the market price at the point to which the property was to be shipped, was harmless. *Walker v. Cooper*, 97 Mo. App. 441, 71 S. W. 370.

(h-1) *Improper evidence cured by instruction to apply to another relevant issue.*

Error in admitting evidence for an improper purpose is cured by an instruction that the jury can consider it only on another issue, as to which it is relevant. *Clement v. Skinner*, 72 Vt. 159, 47 A. 788.

(i-1) *Admission of erroneous evidence afterwards held admissible.*

The admission of evidence which, at the time of its reception, was not strictly admissible, but which, from the whole case, appears to be proper, is not ground for reversal. *Madigan v. De Graff*, 17 Minn. 52 (Gil. 34).

(j-1) *Erroneously requiring foreman to testify whether he expected plaintiff to go between the cars.*

In an action by a servant against a railroad for injuries sustained while he was standing between freight cars endeavoring to take out a coupling pin, any error in requiring plaintiff's foreman to state whether he expected plaintiff to go between the cars was not prejudicial to defendant. *Black v. R. Co.*, 172 Mo. 177, 72 S. W. 559.

(k-1) *Erroneous admission of ex parte affidavits.*

Where ex parte affidavits of co-partners, made after the dissolution of the firm, were erroneously read in evidence, over objection, but the transaction detailed in the affidavits was fully proved by other evidence, their admission was not

reversible error. *Evangelical Synod of North America v. Schoeneich*, 143 Mo. 652, 45 S. W. 647.

(l-1) *Erroneous admission of evidence of wife's labor and earnings.*

In an action by a wife against her former husband to set aside a conveyance alleged to have been fraudulently procured, the admission of evidence as to her labor and earnings, while perhaps erroneous, was harmless error. *Stumff v. Stumff*, 7 Mo. App. 272.

(m-1) *Erroneous evidence by surgeon cured by testimony proving defendant's liability.*

In an action by a surgeon for services as a specialist to an employee of defendant, who had been injured while at work for it, permitting plaintiff to give his opinion as to the party for whom, and on whose faith and credit he rendered the services, is not prejudicial to defendant, where, by subsequent testimony defendant's liability was conclusively established. *Williams v. Griffin Wheel Co.*, 84 Minn. 279, 87 N. W. 773.

(n-1) *Erroneous evidence as to quantity.*

In an action to recover the price of four great-gross of papers of pins, defendant, who was a small merchant, set up fraud, and alleged that his order was for only four gross. He was permitted to testify, without objection, that a merchant doing his business would not sell four great-gross of papers of pins in ten years. Held, that it was not prejudicial error to permit defendant to further testify that it would take him two or three years to sell four gross, since, even if not relevant, substantially the same evidence had been already introduced by him without objection. *Schrimpton v. Philbrick*, 53 Minn. 366, 55 N. W. 551.

(o-1) *Erroneous admission of evidence of condition of sidewalk after the injury.*

In an action against a city for personal injuries from a defective sidewalk, any error in admitting evidence of the condition of the sidewalk after the injury, was rendered harmless by other evidence abundantly establishing the fact that the walk was defective and insecure at the time of the accident. *Richardson v. City of Marceline*, 73 Mo. App. 360.

(p-1) *Improper evidence as to exemption for debts.*

In replevin by a married woman for a cow mortgaged by her husband to defendant, in which plaintiff alleged that the cow was her separate property, and, if not, that it was exempt from debts, being the only milch cow, and that the mortgage was void, she not having consented thereto, the admission of improper evidence on plaintiff's behalf, bearing on the question of exemption, is harmless, if the jury found specially that the cow was plaintiff's. *Denton v. Smith*, 61 Mich. 431, 28 N. W. 160.

(q-1) *Error in admitting evidence of financial standing.*

Error in admitting evidence as to defendants' actual financial standing, instead of confining it to their reputed standing, which alone bears on the injury to plaintiff, is not ground for reversal, where the verdict is so small as to show that the jury could not have been prejudiced by the admission of the evidence. *Farrand v. Aldrich*, 85 Mich. 593, 48 N. W. 628.

(r-1) *Error in admitting evidence as to value of goods held.*

In an action of replevin for goods, wares and merchandise taken from the plaintiff by the defendant, as sheriff, on certain orders of attachment, and held by the sheriff

about two months before the trial of the replevin action, a ruling of the trial court admitting evidence from a competent witness tending to show that there would be a depreciation in the market value of that kind of goods if kept over for another season, is not materially erroneous. *Carson v. Golden*, 36 Kan. 705, 14 P. 166.

(s-1) *Erroneous admission of evidence that nothing prevented the gripman from seeing the team.*

Where, in an action against a street railway company for injuries to a team and wagon, the gripman testified that he saw the plaintiff's team and wagon approach and enter upon the track, the erroneous admission of evidence that there was nothing to prevent the gripman from seeing the team was harmless to defendant. *Hoffman v. Metropolitan St. Ry. Co.*, 51 Mo. App. 273.

(t-1) *Erroneous evidence for one party cured by similar for the other.*

Error in the admission of evidence offered by one party is cured where practically the same evidence is afterwards introduced by the adverse party. *Reed v. New*, 35 Kan. 727, 12 P. 139.

(u-1) *Admission of improper testimony, where the same testimony of other witnesses was afterward admitted without objection.*

Error committed in the admission of testimony offered and objected to is not prejudicial, where the same testimony of other witnesses was afterward admitted without objection. *City of Denver v. Teeter*, 31 Col. 486, 74 P. 459.

(v-1) *Improper evidence of his business, where a portion of his time was occupied with peddling for which he claimed exemptions from execution.*

In claiming a set-off of horses which the plaintiff claimed

as exempt from execution because used in his business of peddling, evidence of an entry in a city directory of plaintiff's business as compiler of hand-books was admitted. Held, that the admission of this evidence, if error, was harmless, since plaintiff admitted that a portion of his time was occupied as compiler of books, and the entry did not negative the fact that a portion of his time was occupied in peddling. *Paulson v. Nunan*, 72 Cal. 243, 13 P. 626.

(w-1) *Improper evidence of cashier of bank as to what books showed.*

It was error to permit the cashier of a bank to state what the books showed on a certain day, where he had no personal knowledge on the subject; but such error is without prejudice where the fact thus proved was of no consequence. *Ah Tong v. Early Fruit Co.*, 112 Cal. 679, 45 P. 7.

(x-1) *Improper evidence though offered not read to jury.*

A ruling that incompetent evidence contained in a certain register is admissible, is not prejudicial error where the record does not show that the register, though offered, was read to the jury. *In re Westerfield*, 96 Cal. 113, 30 P. 1104; *Smith v. Westerfield*, 96 Cal. 113, 30 P. 1104.

(y-1) *Answer to improper question negating theory of counsel propounding it.*

Allowance of improper question is harmless, where the answer negatives the theory of the counsel propounding it. *Ellen v. Lewison*, 88 Cal. 260, 26 P. 109.

(z-1) *On cross-examination, improper question to buyer as to prices.*

Where the buyer has testified to the quality and condition of goods rejected by him, but not as to prices, cross-examination as to his knowledge of prices, allowed on the ground

that it tended to show his interest, though erroneous, is not prejudicial. *Peterson Bros. v. Mineral King Fruit Co.*, 140 Cal. 624, 74 P. 162.

(a-2) *In action for the burning of a harvester, permitting plaintiff to answer question, "What was the amount of damage to the machine by the fire?"*

Where, in an action for the burning of a harvester by a fire set by defendant, the character and extent of the injury was fully described by witnesses, and defendant had ample opportunity to cross-examine plaintiff as to the basis of his estimate of the damages, the error, if any, in permitting plaintiff to answer the question, "What was the amount of the damage to the machine by the fire?" was not prejudicial. *Clarke v. R. Co.*, 142 Cal. 614, 76 P. 507.

(b-2) *Error in admitting affidavit cured by affiant testifying to the same facts.*

Error in the admission of affidavit as evidence is cured by the affiant testifying personally to its contents. *Orr v. Insurance Company*, 120 Ala. 647, 24 S. 997.

(c-2) *Allowing defendant to testify after introducing his deposition.*

It was not reversible error to allow defendant to testify for himself in chief, contrary to Civil Code, sec. 606, subsec. 4, after the introduction of a deposition in his behalf, where the testimony was merely corroborative of the deposition. *Barkley v. Bradford*, 100 Ky. 304, 18 Ky. L. R. 725, 38 S. W. 432.

(d-2) *Improper testimony as to permanency of injuries.*

In an action to recover damages for malicious shooting to wound, the permitting of a witness to testify as to the permanent injury, if erroneous, is harmless, where the amount of

the verdict shows that it could not have influenced the jury, and the instructions did not authorize the jury to consider any permanent injury. *Frazier v. Malcolm*, 22 Ky. L. R. 1876, 62 S. W. 13.

(e-2) *Erroneously accepting statement of counsel that plea had been sworn to.*

That the chancellor accepted the statement of counsel that a pleading had been sworn to before the clerk as evidence of the fact, instead of a statement by the clerk, and permitted him to sign the jurat after the case had been taken up, is not ground for reversal, in the absence of a showing of injury. *Royston v. McCulley* (Tenn. Chy. App.), 59 S. W. 725.

(f-2) *Limiting improper evidence to proper purpose.*

Possible error in the introduction of a receipt in evidence is cured by limiting it to a purpose which could not have prejudiced the adverse party. *Runnels v. Village of Pentwater*, 109 Mich. 212, 67 N. W. 558, 3 D. L. N. 181.

(g-2) *Improper evidence charging another with theft.*

Plaintiff asked defendant if he had not stated that a certain witness of his had stolen a certain article from him, and that he intended to hold the theft over his head until after the action was over. Defendant denied making the statement, and the person to whom plaintiff claimed it was made also denied it. No motion was made to strike out such testimony, nor was there any showing but that plaintiff's counsel acted in good faith in opening the inquiry, and defendant, without objection, testified to other thefts by the witness. Held: that the evidence was not prejudicial to the defendant. *Hoffman v. Adams*, 106 Mich. 111, 64 N. W. 7.

- (h-2) *It is not sufficient to bring up merely the excluded improper question and proposed answer in error, without sufficient other evidence to show their connection or relevancy.*

It is not sufficient to bring up merely the excluded question and proposed answer, without sufficient other evidence to show their connection or relevancy. *Coston v. Paige*, 9 O. S. 397; *Landid v. Dayton, Wright* (Ohio Sup.) 659.

- (i-2) *Where objectionable evidence was retained after objection sustained, the appellate court will not reverse, as it can not be assumed any further facts would have been proven by the witness.*

In an action against an administrator for compensation for services performed for the testator, a partner of plaintiff testified that the plaintiff told him that he was attending to testator's affairs. Testator was not present when this statement was made, and defendant's counsel objected to the evidence and questioned the witness, with the object of showing that he was an interested party, following it by an objection to the testimony, which the court sustained. The testimony already given was not stricken out, nor did plaintiff's counsel offer any other testimony by this witness. Held, that the appellate court will not reverse, even though the objection was erroneously sustained, as the evidence of the witness was retained, and it can not be assumed that any further facts would have been proven by him. *Watson v. Miller*, 125 Cal. xix, 58 P. 135.

- (j-2) *To avoid reversal for improper evidence, where fact properly proved, it must clearly appear that erroneous testimony could not have been prejudicial.*

In order to avoid a reversal for the admission of improper testimony, on the ground that the same fact was proved by

proper testimony, it must be clear that the erroneous testimony could not have been prejudicial. *Roff v. Duane*, 27 Cal. 505.

(k-2) *Improper evidence to jury, where suit is in equity and verdict only advisory.*

Where a case was in equity, and the verdict of the jury was at most only advisory to the court, that the court admitted improper evidence to go before the jury will not justify a reversal, as the correctness of the decision of the court, and not the verdict, is the question to be determined. *Cal. Elec. Light Co. v. Cal. Safe Deposit, etc., Co.*, 145 Cal. 124, 78 P. 372.

(l-2) *In action for injuries evidence of former earnings.*

Where a servant prior to his employment as a motorman, in which he was injured, had not worked for wages, the admission of evidence that he had been engaged in buying and selling live stock, in which business he sometimes lost money, and at other times made from \$2,000 to \$4,000 a year, was not reversible error. *Cole v. St. Louis Transit Co.*, 183 Mo. 81, 81 S. W. 1138.

(m-2) *Allowing witness to be asked if he made a certain statement where there is nothing in the case to question his denial that he did.*

When a witness fails to give any evidence in relation to a fact, and he is then asked by the party calling him if he had not made a statement to others as to the existence of such facts, which is denied by the witness, the error in overruling the objection to such question will not warrant a reversal when no such evidence is offered to show that the witness did, in fact, make the statement denied by him. *Davies v. Oceanic S. S. Co.*, 89 Cal. 280, 26 P. 827.

(n-2) *Evidence of fence down and in bad condition elsewhere than where charged.*

Where there was no dispute as to fact that plaintiff's cattle entered upon defendant's right of way at a place where defendant's fence was down and in bad condition, evidence showing that such fence was down and in bad condition elsewhere was harmless. Price v. Barnard, 70 Mo. App. 175.

(o-2) *Improper evidence of value in legal tenders.*

The court will not set aside a judgment in an action to recover possession of personal property, on the ground that evidence of its value in legal tenders was improperly introduced, and the jury found its value in such notes, as no injury was done defendant thereby, the value of gold and legal tenders being the same in legal contemplation. Tarpv v. Shepherd, 30 Cal. 180.

(p-2) *Erroneous evidence which becomes immaterial by the charge of the court.*

An error in the admission of evidence that becomes immaterial under the instructions is not ground for complaint. Wreggitt v. Barnett, 99 Mich. 477, 58 N. W. 467; Sterling v. Callahan, 106 Mich. 128, 63 N. W. 982.

Sec. 94. Improper questions.

(a) *Allowing improper but uninjurious question.*

Allowing improper questions will not reverse a judgment, where it appears from the whole record that appellant was not injured thereby. Randall v. Greenwood, 3 Mont. 506; Yale v. Edgerton, 14 Minn. 194 (Gil. 144); Flanders v. Davis, 19 N. H. 139; Vaughn v. Clarkson (R. I.), 34 A. 989; Kalbus v. Abbott, 77 Wis. 621, 46 N. W. 810; Asbach v. R. Co., 86 Iowa 101, 53 N. W. 90.

(b) *Question to defendant imputing untruthfulness.*

Questions asked of the defendant on cross-examination

are not prejudicial because imputing untruthfulness to him, where his testimony, and that of plaintiff, are so opposed, that both can not be true. *Marbeck v. Germain*, 144 Mich. 157, 107 N. W. 901, 13 D. L. N. 175.

(c) *Improper question in action for work and labor.*

In an action for work and labor performed by plaintiff for defendant while living with him, a question to defendant, as a witness, as follows, "Taking into consideration the matter you complain of, the doctor's bills made up for him, and all the other things you did for him, what, if anything, would his work be worth more than you paid him?" while improper in form, because too general and indefinite, was, nevertheless, not reversible error. *Johnson v. Thompson*, 72 Ind. 167, 37 Am. St. Rep. 152.

(d) *Erroneously overruling objections to improper questions.*

The erroneous overruling of objections to questions asked on cross-examination, is not ground for reversal when the answers to such questions in no way prejudice appellant. *Akers v. Thwing*, 52 Minn. 395, 54 N. W. 194.

(e) *Asking improper question, not answered, which jury directed to disregard.*

The mere asking of an improper question which is not answered, and which the court directs the jury to disregard is not like actually admitting an improper question, but is analogous to an offer of improper evidence which is excluded, which is rarely reversible error; it may be if counsel persists in trying to get it before the jury. *Fraser v. Blanchard & Crowley*, 83 Vt. 136, 73 A. 995, aff'd on rehearing, 83 Vt. 136, 75 A. 797.

Sec. 95. Improper question not answered.*(a) Improper question not answered by the witness.*

Allowing a witness to be asked an improper question is harmless, where the question does not appear to have been answered. *Conoly v. Cayle*, 61 Ala. 116; *Church v. Davis*, 93 Mich. 477, 53 N. W. 732; *Carter v. Bedertha*, 124 Mich. 548, 83 N. W. 277, 7 D. L. N. 325; *Warson v. McElroy*, 33 Mo. App. 533; *Carder v. Prunin*, 52 Mo. App. 102; *Louis v. State*, 8 Neb. 405; *Washington Luna Park Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977.

Sec. 96. Improper question properly answered.*(a) Improper question cured by proper answer.*

A question to a witness as to the value of certain services is no ground for reversal, for that it calls for value not pecuniary, where the answer is as to pecuniary value alone. *R. Co. v. Bivans*, 42 Ill. App. 450 (cf. 142 Ill. 401); *Jewell City v. Van Meter*, 70 Kan. 887, 79 P. 149; *Somerville v. Richards*, 37 Mich. 299; *In re Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; *R. Co. v. Ryan*, 37 Minn. 38, 33 N. W. 6; *Bridgman v. Halberg*, 52 Minn. 376, 54 N. W. 752; *Foynon v. Knox*, 40 Super. Ct. (8 J. & S. N. Y.) 41, rev. o. o. g. 1 Abb. n. c. 246, 66 N. Y. 525; *Doolittle v. Eddy*, 7 Barb. 74; *Bardin v. Stevenson*, 75 N. Y. 164; *Town of Randolph v. Town of Woodstock*. 35 Vt. 291.

(b) Improper question cured by answer showing no knowledge on the subject.

The error in permitting a witness to answer an improper question was harmless, where the witness showed that he had no knowledge on the subject. *R. Co. v. Christian's Adm'r*, 110 Va. 723, 67 S. E. 345; *Peck v. Snyder*, 13 Mich. 21; *Hill v. Robinson*, 23 Mich. 24;

Wallace v. Van Wagoner, 20 N. J. L. 175; Coolide v. Ayers, 77 Vt. 448, 61 A. 40; Mercy v. Parker, 78 Vt. 73, 62 A. 19.

(c) *Improper question eliciting a negative answer.*

No reversal can be had for the erroneous admission of a question on cross-examination asked defendant, if he had not committed certain frauds unconnected with the case, if his answer is an unqualified denial, for no prejudice can have arisen therefrom. Minx v. Mitchell, 42 Kan. 688, 22 P. 709; also, where witness answers that he does not remember, Harker v. Woolery, 10 Wash. 484, 39 P. 100.

(d) *Erroneous question by the court cured by negative answer.*

Where, in an action for slander, the court, after erroneously sustaining objections to certain questions asked of the witness as leading, itself asked the question, "Whether anything was said, in the conversation previously inquired about, concerning plaintiff's character for chastity and virtue; and, if so, to state what it was;" to which the witness answered that he had no recollection of "anything being said about her character," defendant was not prejudiced by the error. Knight v. Lee, 80 Ind. 201.

(e) *Harmless answer to improper question.*

Error in permitting a question to be put to a witness which is leading and is also objectionable as an attempt to prove the declarations of a person not a party to the record, and to lay the foundation for an impeachment of plaintiff's own witness, without giving answer thereto, is not ground for reversal, where the witness stated nothing in response that could have prejudiced the complaining party. Gannon v. Stevens, 13 Kan. 447.

(f) *Irresponsive answer cured erroneous question.*

Error in allowing plaintiff to ask his witness what a certain person said to another person (named) about a fire having been started from defendant's engine, was harmless, where the answer was not responsive, and nothing was stated as to the origin of the fire. R. Co. v. Long, 16 Ind. App. 401, 45 N. E. 484.

(g) *Erroneous question as to reputation answered from his own knowledge.*

Where the quality of a certain slate is in question, testimony as to the reputation of the quarry from which it was produced is incompetent; but if, in answer to a question as to such reputation, a witness testified as to the quality of the stone from his own knowledge, the erroneous admission of the question is without prejudice, and not ground for reversal. Chalmers v. Whittemore, 22 Minn. 305.

(h) *Improper question cured by answer favorable to complainant.*

The asking of an improper question can not be complained of by the party to whom the answer was favorable. (Col.) Eli Mining & Land Co. v. Carleton, 108 F. 24, 47 C. C. A. 166; Frederick Mfg. Co. v. Devlin (N. J.), 127 F. 71, 62 C. C. A. 53.

(i) *Answer cured error in sustaining objection to question.*

Where a witness denied knowledge of the fact inquired about, notwithstanding the objection to the question was sustained, error, if any, in sustaining such objection was without prejudice. White v. Insurance Company, 97 Mo. App. 590, 71 S. W. 707.

(j) *Incompetent question, but answer not prejudicial.*

In an action by an attorney for professional services, a question to a witness, "From what you know of the services of plaintiff to defendant, what you know of his standing as a lawyer, the responsibility of the work, and from your personal knowledge of the facts of the case, and assuming plaintiff did prepare the trial brief, with the defendants' claim, \$19,500, and were awarded \$8,500, what, in your judgment, were plaintiff's services worth to defendants?" Held, while incompetent, insufficient ground for reversal, where defendants were not prejudiced by the answer. *Bramble v. Hunt*, 68 Hun 204, 52 State Rep. 92, 22 N. Y. Supp. 842.

(k) *Improper form of question which elicited proper answer.*

Plaintiff, over the objection that the question called the witness to state whether defendant was negligent or not, was allowed to ask certain questions of an expert electrician as to what matters should be taken into consideration in locating wires such as those in question, and whether it was proper or prudent management to put them so low over a metallic roof. The answer gave the facts in full, and explained what methods would have been safe. Held that, as the information could have been obtained by questions proper in form, and negligence had been fully proved by other evidence, defendant was not injured by the form of the question. *Girandi v. Electric Imp. Co.*, 107 Cal. 120, 40 P. 108, 48 Am. St. Rep. 114, 28 L. R. A. 596; *Calhoun v. O'Neal*, 53 Ill. 354.

Sec. 97. Irrelevant evidence.

(a) *Irrelevant or immaterial evidence not influencing the determination.*

The admission of irrelevant evidence is not ground for

reversing a judgment, where it could not have influenced the determination. *Smart v. Easley*, 28 Ky. (5 J. J. Marsh.) 214; *Kercheval v. Ambler*, 34 Ky. (4 Dana) 166; *Kimberlin v. Fiaris*, 35 Ky. (5 Dana) 533; *R. Co. v. Johnson*, 2 Ky. L. R. (abst.) 225; *Union Con. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. ed. 541; *Kidd v. Temple*, 22 Cal. 255; *Eppinger v. Scott*, 112 Cal. 369, 42 P. 301; *Carpenter v. Notris*, 20 Cal. 437; *Clarke v. Lockwood*, 21 Cal. 220; *Lindsey v. Lindsey*, 14 Ga. 657; *Bradbury v. Land Co.*, 2 Ida. 221, 10 P. 620; *Shepard v. Allen*, 16 Kan. 182; *Rich v. N. W. Cattle Co.*, 48 Kan. 197, 29 P. 466; *Lynd v. Picket*, 7 Minn. 184 (Gil. 128); *Lane v. Kingsbury*, 11 Mo. 402; *Moss v. Kaufman*, 131 Mo. 424, 33 S. W. 20; *Singer v. Goldenburg*, 17 Mo. App. 549; *Griffith v. Gilium*, 31 Mo. App. 33; *Renfrew v. Goodfellow (Mo.)*, 141 S. W. 1153; *Anderson v. Shockley*, 82 Mo. 250; *Haskorce v. R. Co.*, 85 Neb. 295, 123 N. W. 305; *Price v. Coblitz*, 21 O. C. C. 732, 12 O. C. D. 34; *Woodan v. R. Co.*, 5 Wash. 466, 32 P. 103; *Crane v. Dexter Horton Co.*, 5 Wash. 479, 32 P. 223.

(b) *Irrelevant evidence cured by charge to disregard it.*

The admission of irrelevant evidence was harmless where the court instructed the jury to disregard it. *Northrop v. Diggs*, 146 Mo. App. 145, 123 S. W. 954; *Corbin v. Dunkle*, 14 Col. App. 337, 59 P. 842, 1042.

(c) *Irrelevant testimony of the quality of tin.*

Where, on the issue as to the quality of tin used in the furnace pipes, evidence was given that the tin was taken from a box marked X Tin; but the irrelevancy of such evidence was shown by the fact that tin of different qualities was often shipped in the same box, the admission of such irrelevant evidence was not prejudicial. *Halpin v. Manny*, 57 Mo. App. 59.

(d) *Irrelevant testimony in action against surety not prejudicial.*

Evidence in an action by a surety against his principal, that defendant guaranteed to save plaintiff harmless, introduced in the course of proving that defendant induced plaintiff to become surety on certain notes, and not as the basis of the judgment, was not prejudicial error. *Markham v. Cover*, 99 Mo. App. 83, 72 S. W. 474.

(e) *Irrelevant evidence by interpleader was harmless.*

On trial of an action commenced by the attachment of certain household goods which were claimed by an interpleader, under a chattel mortgage, the interpleader testified that he had let defendant have various sums of money which constituted the amount secured by the mortgage, and that he was the owner of certain teams which defendant used in the business in which he was engaged, and as to what he paid for these teams. Held that, though this evidence was irrelevant, it was harmless to plaintiff. *Lafferty v. Hilliker* (Mo. App.), 81 S. W. 910.

(f) *Error in admitting irrelevant and immaterial evidence cured by the same later becoming material.*

Error in admitting irrelevant and immaterial evidence is cured if, during the further progress of the case, the evidence becomes material. *Wise v. Collins*, 121 Cal. 147, 53 P. 640.

(g) *Irrelevant testimony where facts found independent thereof.*

The admission of irrelevant testimony is not ground for reversal of a judgment rendered upon a finding of facts, in no way based upon such improper testimony. *Delta Lumber Co. v. Williams*, 73 Mich. 86, 40 N. W. 940.

Sec. 98. Irresponsive evidence.*(a) Irresponsive but harmless evidence.*

The reception of evidence which responds to no issue in the case, but which is incapable of misconstruction, is not reversible error. *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N. W. 842.

Sec. 99. Land values.*(a) Error of the court in computing value of land as of the date of the contract, instead of the date of the deed.*

In an action for failure to convey land as agreed, an error of the court in computing damages in estimating the value of the land as of the date of the contract, instead of the date of the deed as it ought to have been made, was not prejudicial to defendant, where the evidence showed that there was no difference in the value of the land after the date of the contract. *Whitworth v. Pool*, 20 Ky. L. R. 1104, 6 S. W. 880.

(b) Where plaintiff introduced no evidence of the value of the land, allowing defendant to do so.

Where plaintiff, in an action to rescind a contract for the purchase of land, alleged that it was worth only \$6,000, but introduced no evidence of its value, error in the admission of evidence of value, on the part of the defendant, was harmless, since the burden to show value was on plaintiff. *Fowler v. Carne*, 132 Cal. xviii, 64 P. 581.

(c) Where witness testified that the damage was equal to the whole value of the land, not prejudicial to ask if he would give as much for the tract after the removal of the soil as before.

Where a witness, in an action for removing the soil

from a portion of a tract of land, has testified that he is acquainted with the value of the land in the locality, and that the portion from which the soil was removed was injured to the extent of its whole value, it is not prejudicial to defendant to ask witness whether he would give as much for the tract after the removal of the soil as before. *Williams v. Fresno Canal & Irri. Co.*, 96 Cal. 14, 31 Am. St. Rep. 172, 30 P. 961.

(d) *Refusal to strike out improper testimony as to the value of land.*

In proceedings for the condemnation of land for railroad purposes, under the statute, the value of the land at the time it is taken is the measure of damages. One witness stated the basis of his estimate of damages to be the value of the land at the time of trial. Several others stated that their estimate was based upon the value of the land at the time of the taking. The court repeatedly charged that the value of the land at the latter time was the true basis. Held, that the refusal to strike out the testimony of the first witness was not reversible error. *R. Co. v. Lieunallen*, 2 Ida. 1101, 29 P. 854.

Sec. 100. Leading questions.

(a) *Error in refusing a question as leading immaterial.*

Error in refusing as leading a question asked the grantor in an alleged fraudulent conveyance, "Did L have a judgment against him?" was not ground for reversal, as, if there were any such judgment, it was a matter of record which the grantor might have produced had he so desired. State to use of *Guthrie v. Martin*, 52 Mo. App. 511.

(b) *Leading and improper question where defendant free to cross-examine.*

If, in the examination of the plaintiff, leading and im-

proper questions were propounded, it is not cause for reversal, the defendant having been left free to cross-examine the witness. *R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521.

Sec. 101. Malice.

(a) *Erroneous evidence as to malice not prejudicial.*

Where the jury failed to allow exemplary damages, any error in the admission of evidence as to malice will be error without prejudice. *Brown v. Hendrickson*, 69 Iowa 749.

Sec. 102. Offer of compromise.

(a) *Where defendant filed counterclaim, without denying plaintiff's cause of action, harmless error to admit defendant's offer to compromise.*

Where defendant set up a counterclaim, without denying plaintiff's cause of action, error in admitting evidence of an offer of defendant to compromise plaintiff's claim was harmless, since plaintiff was not required to prove his claim. *Smith v. Satterlee*, 12 N. Y. St. Rep. 626.

(b) *Cross-examination in regard to compromise, where answer negatived same.*

The defendant, in an action for damages for flooding of lands, could not have been prejudiced by the allowance of the question, on cross-examination of its president, when on the stand as a witness, whether the defendant had not compromised and paid claims made against it for flooding lands by means of its booms, where the answer negatived any such compromises or payments, and therefore it will not be heard to complain of the admission thereof. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

- (c) *Evidence of offer of compromise cured by instruction of court.*

Where, in an action for profits which would have been made on a contract, plaintiff testified, on cross-examination, that an offer to settle for \$100 was made, and on re-examination, that such offer was based on the expense he had been put to; and the court, at the instance of defendant, instructed that the jury was not to consider, as an element of damage, the amount of work done or the value of the material furnished, the jury could not have been misled by the admission of such evidence. *Ellis v. Mackie Const. Co.*, 60 Mo. App. 67.

- (d) *Remarks between counsel as to alleged offer by defendant to compromise not ground for reversal.*

Remarks between counsel in regard to an alleged offer by defendant to compromise do not warrant a reversal of the judgment in favor of plaintiff, where the statement regarding the offer to compromise was withdrawn, and no ruling of the court or admonition of the jury by the court was made. *Miller v. Auburn Private Hotel Co.*, 32 O. C. C. R. 645.

Sec. 103. Opinion evidence.

- (a) *Opinion volunteered by witness not ground for reversal.*

Where, in an action for injury from a defective sidewalk, a witness, when asked to state the condition of the walk, replied that he did not think it good, and then proceeded to describe it; and another introduced, in answer to the same question, said that it appeared to be in bad condition, when plaintiff's counsel at once admonished her that her answer was improper, and asked her to state the shape that it was in, the fact that the witness gave opinions of the condition of the walk, which counsel could not prevent, and which he corrected at once, should

not be made ground for reversal. *Styles v. Village of Decatur*, 131 Mich. 443, 91 N. W. 622, 9 D. L. N. 396; *Whittlesey v. Kellogg*, 28 Mo. 404.

(b) *Opinion evidence harmless, where allowed to testify to all the facts from which the conclusion is drawn.*

In an action against a corporation by an employee for personal injuries resulting from a defective platform on which he was working, it was not prejudicial error to refuse to allow defendant's president to answer the question, "Did you notice at any time any defect in this platform?" on the ground that it called for his opinion, where he was allowed to testify as to all the facts from which his conclusion could be drawn. *Alexander v. Central Lumber & Mill Co.*, 104 Cal. 532, 38 P. 410; *Merkle v. Bennington Tp.*, 68 Mich. 133, 35 N. W. 846; *Sparks v. Galena Nat. Bank*, 68 Kan. 148, 74 P. 619; *Insurance Co. v. Woolen Mill Co.*, 72 Kan. 41, 82 P. 518; *Borrett v. Perry*, 148 Ill. App. 622; *Robertson v. R. Co.*, 84 Mo. 119; *Duhme Jewelry Co. v. Hazen*, 27 O. C. C. R. 779.

(c) *Opinion evidence that did not influence jury.*

Error in permitting a witness to state that she thought that the wagon loaded with barrels was going to defendant's distillery was harmless, as the jury could not have given any weight to the statement, as it appears from the cross-examination of the witness that she had no personal knowledge as to the matter. *Jackson-Vanardsall Distillery Co. v. Moore*, 22 Ky. L. R. 1749, 61 S. W. 368.

(d) *Where opinion was too unreasonable to have done harm.*

Where plaintiff was injured in a quarry, error in permitting plaintiff to testify that, had he remained in the place where he sought shelter, and been there when the

rock fell, he would not have been struck by it; it being a mere opinion was harmless where, under the conceded facts, it was a physical impossibility that plaintiff could have been struck by the falling rock in any other place than where he actually was struck. *Cox v. Suenite Granite Co.*, 39 Mo. App. 424.

(e) *Excusable opinion evidence.*

In an action on a fire insurance policy, where plaintiff's loss was total, and the fire destroyed their books and inventories, so that the matter of ascertaining the value of the property destroyed was difficult, evidence by plaintiffs of the comparative amount of lumber carried in their yards before the fire and that of another lumber dealer was not, because it called for a conclusion, sufficiently harmful, if improper at all, to necessitate a reversal of the judgment for plaintiffs. *Seigel v. Badge Lumber Co.*, 106 Mo. App. 110, 80 S. W. 4.

(f) *Opinion of witness of a conceded fact.*

The opinion of a witness as to the existence of a fact which is conceded is not prejudicial. *Hyatt v. Town of Swanton*, 72 Vt. 242, 47 A. 790.

(g) *Opinion evidence, when proper evidence proved it.*

A judgment will not be reversed for error in permitting a witness to testify to his opinion, where he also testified to facts which showed that his conclusion was the only one that could be drawn from the facts. *R. Co. v. Allmon*, 147 Ill. 471; *Raymond v. Glover*, 122 Cal. 471, 55 P. 398; *Steiner v. Eppinger*, 61 F. 253, 9 C. C. A. 483; *Aikin v. Leonard*, 1 Ore. 224.

(h) *Opinion evidence that was merely cumulative.*

Where the evidence of a witness is objectionable as

his conclusion, but is merely cumulative, no prejudice appears which will constitute reversible error. *Shaefer v. R. Co.*, 98 Mo. App. 445, 72 S. W. 154.

- (i) *Allowing witness, not an expert, to give unprejudicial opinion.*

Judgment will not be reversed for improperly allowing a witness, not shown to be a qualified expert, to give an opinion, if his answer can not have prejudiced the party excepting. *Bixby v. R. Co.*, 49 Vt. 123.

- (j) *Erroneous opinion evidence cured by subsequent ruling limiting the damages recoverable.*

In ejectment for a mine, an error in permitting plaintiff to state his opinion as to the damage he suffered in consequence of its detention by defendant, is cured by a subsequent ruling that the only damage plaintiff was entitled to, was the value of the rents and profits from the commencement of the action to the time of the trial, as provided by statute. *Lacey v. Woodward*, 5 N. M. (Gilds) 583, 25 P. 785.

- (k) *Error cured by instruction that jury were not bound by the opinions of witnesses.*

Any error in the admission of the opinions of witnesses as to what the rental value of the plaintiff's premises would have been if the stream had flowed pure water, and as to their value in the condition which prevailed from the time the pollution began, without the testimony being limited to depreciation due exclusively to the pollution of the stream by defendant, was cured by a charge that the jury were not bound by the opinions of the witnesses. *Muncie Pulp Co. v. Martin*, 164 Ind. 30, 72 N. E. 882.

- (l) *Allowing a witness to give an opinion on a matter of common knowledge or observation.*

Allowing a witness to give an opinion on a matter of common knowledge or observation is harmless error. *Kennenberg v. Nuff*, 74 Conn. 62, 49 A. 853; *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354; *R. Co. v. Terry*, 14 O. C. C. R. 536, 7 O. C. D. 297; *Lane Bros. v. Bauserman*, 103 Va. 146, 48 S. E. 857, 106 Am. St. Rep. 872; *R. Co. v. Plummer (Ky.)*, 35 S. W. 113; *R. Co. v. Gilchrist*, 4 Wash. 509, 30 P 738.

- (m) *Improper question calling for opinion which was harmless.*

A witness for plaintiff testified as an expert in the mechanism of electric cars, such as that which caused the accident, was asked whether such a car could be safely operated without a sandbox, and testified that it could not. Held that, although the question was improper as calling for an opinion on a question which the jury was to decide, the error was harmless, as the witness's subsequent testimony showed that he meant only a brake would not work on a greasy rail without sand. *R. Co. v. Van Dyke (N. Y.)*, 18 C. C. A. 632, *affm'g Van Dyke v. R. Co.*, 67 F. 296; *R. Co. v. Bivans*, 42 Ill. App. 450.

- (n) *Opinion of non-expert witness as to ability to stop a street car.*

In an action against a street railway for injuries to a passenger because of a collision between the car and a vehicle, a witness, not called as an expert, was permitted to give it as his opinion that a train could, under ordinary circumstances, have been stopped at a distance of eight to twenty feet. The gripman in charge of the train called as a witness by defendant, testified that he did stop the train in a distance of fifteen feet. There was sufficient

evidence to show that the gripman had timely warning to stop the train many feet before coming to the point of danger. Held, that the admission of the non-expert witness was harmless. *Parker v. R. Co.*, 69 Mo. App. 54.

(o) *Non-expert opinion of the value of a piano.*

Defendants are not prejudiced by the admission of non-expert testimony as to the value of a piano, where the jury placed the value considerably below that stated by the expert and accepted defendant's own estimate as given in the indemnity bond. *State to the use of Gannet v. Johnson*, 1 Mo. App. 219.

(p) *Opinion evidence of damages to farm by washings and caving away.*

Where the measure of damages had been stated in the presence of the jury to be deterioration of the value of the farm by reason of the negligent acts of defendant, and it can not be doubted that they understood this was what the witness was attempting to state, when he gave his opinion as to the amount of damages resulting from the washing and caving away of the land, there was no prejudice therefrom, though the form of the question was objectionable. *Dickinson v. R. Co.*, 148 Mich. 461, 14 D. L. N. 252, 111 N. W. 1078.

(q) *Opinion of witness as to financial condition of a bank.*

In an action against an officer of a bank for receiving deposits after he knew it was insolvent, while the testimony of a witness that if the bank was properly managed the directors could very easily ascertain its condition, was improper, as the mere opinion of a witness, its admission was not prejudicial to defendants. *Speer v. Burlingame*, 61 Mo. App. 75.

(r) *Opinion evidence in regard to cause of an explosion.*

The erroneous admission of the opinions of witnesses as to the cause of an explosion, held without prejudice, where the material facts were not in dispute, and the opinions were merely arguments therefrom. (N. Y.) *Castner Electrolytic Alkali Co. v. Davies*, 154 F. 938, 83 C. C. A. 510.

(s) *Opinion evidence that the attempt to raise the floor, without blocking the timbers beneath, so that if the jack buckled, the floor would not fall, was negligence.*

The floor beneath an ice chamber in defendant's building, containing about 100 tons of ice, settled, and defendant's vice-president was attempting, with a crew of men, to raise it by means of timbers and jacks. The floor was raised clear of one of the upright, permanent timbers supporting it, when the jacks buckled, and one of them fell against the timber, knocking it over to the floor and ice fell on plaintiff, an employee, who was removing meat and debris from the room beneath the chamber. Held, in an action for the injuries, that the admission of opinion evidence that the attempt to raise the floor, without blocking up the timbers beneath it so that if the jack buckled the floor would not fall, was a negligent and careless way of doing the work, if erroneous, was harmless. *Williams v. Morris*, 237 Ill. 254, 86 N. E. 729.

(t) *In a suit for personal injuries, opinion asked of expert as to percentage surviving the third stroke of paralysis.*

In an action for personal injuries, a medical expert was asked his opinion as to the usual percentage surviving the third stroke of paralysis, and answered there were comparatively few, on account of the weakness of the arteries; held, that even if improper, the answer was so

indefinite that no injury resulted to defendant. *Perkins v. Sunset Tel. & Telegraph Co.*, 155 Cal. 712, 103 P. 190.

(u) *Uncommittal opinion of witness did not injure defendant.*

In an action for personal injuries, where a physician was asked whether the condition he had indicated in regard to plaintiff was permanent or not, his answer, "That is my opinion, yes, sir," did not injure defendant, since it did not indicate what the opinion of the witness was. *Freeman v. Vetter* (Tex. Civ. App.), 130 S. W. 190.

(v) *Admitting opinion that a pit in a city street filled with boiling lime and water is dangerous to children.*

Any error in admitting an opinion that a pit maintained in a public street of a great city, filled with boiling lime and water, is a dangerous thing to children, is harmless, it being a matter of common knowledge. *Buttron v. Bridell* (Mo. Sup.), 129 S. W. 12, 228 Mo. 622.

(w) *Allowing experts to give opinions as to the cause of an accident.*

Error in allowing experts to give their opinions as to the cause of an accident is harmless, their answers being clearly right and their conclusions self-evident. *Luper v. Henry* (Wash. Sup.), 109 P. 208.

(x) *Admission of opinion of persons that horse had a bad reputation.*

Where decedent's death was alleged to have been caused by the fractious character of defendant's horse and the incompetency of his driver, and the bad habits of the horse, defendant was not prejudiced by the court's erroneous admission of the opinions of persons that the horse had a bad reputation, and that the driver was negligent and incompetent. *Mayfield Lumber Co. v. Lewis's Adm'r*, 142 Ky. 727, 135 S. W. 420.

(y) *Opinion evidence showing recognition by defendant of plaintiff's interest in real estate.*

The fact that a part of the testimony tending to show a recognition by the defendant of plaintiff's one-fourth interest was a mere opinion of the plaintiff as a witness, an objection to which was overruled, is not sufficient ground for reversal, where the facts showing such recognition were stated fully by the witness, and were not controverted by the defendant. *Costa v. Silva*, 127 Cal. 351, 59 P. 695.

(z) *If proof shows land suitable for cultivation, that some of the witnesses allowed to express opinions thereon was not prejudicial.*

If facts appear in evidence show that the land is suitable for cultivation, objection that some of the witnesses were allowed to express their opinions as to the question of suitability for cultivation is not ground for reversing the judgment. *Belcher v. Farren*, 89 Cal. 73, 26 P. 791.

(a-1) *Opinion evidence of the value of a horse.*

The defendant was not prejudiced by the action of the court in permitting plaintiff to give his opinion as to the market value of a horse at the time of trial, in view, not only of the injuries complained of in this action, but in view of a prior injury and of the vicious habits of the horse, as an intelligent jury could not have held the company liable for the depreciation in value on account of prior injury and the vicious habits of the horse. *R. Co. v. Hogan*, 16 Ky. L. R. (abst.) 444.

(b-1) *Not error to refuse to permit opinion evidence.*

Where a witness had testified fully as to his knowledge of the condition of the place he had seen, it can not have

been injurious error to refuse to permit him to say that if it had been otherwise he would have noticed it, that being mere opinion. *Burt v. Wrigley*, 43 Ill. App. 367.

(c-1) *Permitting a witness to state a conclusion as his opinion.*

Where only one conclusion could be drawn from the facts to which a witness testified, the error, if any, in permitting a witness to state such conclusion, as his opinion, was not prejudicial. *Evans Ditch Co. v. Lakeside Ditch Co.* (Cal. App.), 108 P. 1027.

(d-1) *Allowing witnesses, in an action for death at a crossing, to give their opinion as to whether the crossing was dangerous.*

Railroad crossings are inherently dangerous, and were so regarded by the common law before the statute requiring signboards, with the words, "railroad crossing" printed thereon, and the blowing of the whistle and ringing of the bell when approaching the crossing, which was enacted, not for the purpose of declaring the crossing dangerous, but merely to minimize the danger; hence, any error in allowing witnesses, in an action for death at a crossing, to give their opinion as to whether the crossing was dangerous, was harmless, both under the statute and common law. *Turbyfill v. R. Co.*, 86 S. C. 379, 68 S. E. 687.

Sec. 104. Permitting plaintiff to exhibit injuries to the jury.

(a) *Permitting a plaintiff to exhibit his injuries to the jury.*

In an action for injuries, the complaint alleged that by reason of the injuries plaintiff had lost the use of the muscles of his left leg, had lost a great deal of feeling, and that he could not properly control his left foot. Plaintiff's physician testified that there was some swell-

ing in the leg, extending to the foot and ankle, that there had been a sore on the heel which would not heal, apparently made from pressure, and that it might have been by direct injury or have resulted from pressure. Held, that defendant was not prejudiced by the court's permitting the plaintiff to testify, over objection, that he had a sore on his heel that suppurated at times, which was nearly half an inch deep, and to exhibit his foot to the jury, though the testimony was not strictly relevant under the allegations in the complaint. (Wash.) *Katella v. Rones*, 108 C. C. A. 132, *affm'g* 182 F. 946.

Sec. 105. Presumptions.

(a) *No injury presumed to adverse party by permitting replication to be filed nunc pro tunc.*

If a party neither move for a continuance, nor for a new trial, on account of the exercise by the court of the discretionary power, such as allowing a replication to be filed *nunc pro tunc*, it is to be presumed he has suffered no injury therefrom. *Kiser v. Wilkes*, 5 Mo. 519.

(b) *When adverse party does not ask for delay to plead, it will be assumed that amendment did not prejudice him.*

Where, on the making of the amendment, the adverse party does not ask for delay to plead to the issues or to prepare for trial, it will be presumed on appeal that he was not prejudiced by the amendment. *Burr v. Mendenhall*, 49 Ind. 496.

(c) *Omission to insert in jurat the date on which the affidavit for injunction was sworn to raises the presumption that it was the same date as the bill.*

The omission to insert in the jurat the date on which the affidavit attached to a bill for injunction was sworn to is not material. The presumption will be indulged

that the oath was administered upon the date the bill was filed. *Eban v. Brown*, 139 Ill. App. 213.

(d) *Injury presumed from error, and it devolves on opposite party to show no injury resulted therefrom.*

Injury will be presumed from error, and it is incumbent upon respondent to make it appear to the contrary. *Thelheel v. Scott*, 100 Cal. 372, 34 P. 861; *Mateer v. Brown*, 1 Cal. 231; *Leonard v. Kingley*, 50 Cal. 628.

(e) *Where evidence is excluded for judicial notice taken of fact, it is presumed no harm resulted therefrom.*

If the court excludes a remittitur as evidence, on the ground that it will take judicial notice of the fact alleged, the presumption is that judicial notice of it was taken, and that no harm could be done by the exclusion, even if erroneous. *Gambert v. Hart*, 44 Cal. 542.

(f) *There is no presumption that excluded evidence would be non-prejudicial.*

There is no presumption that evidence not included in the bill of exceptions would show errors complained of to be non-prejudicial. *Polkinghorn v. Riverside Portland Cement Co.*, 24 Cal. App. 615, 142 P. 140.

(g) *Presumption that the jury considered relevant evidence.*

The jury is entitled to receive the relevant evidence offered by the parties, but the court should not admit any irrelevant or illegal evidence, and where irrelevant evidence offered by a party is admitted, it will be presumed that the jurors considered it. *R. Co. v. Teasley* (Ala. Sup.), 65 S. 981.

(h) *Where evidence sustains verdict, presumption is against improper remarks of counsel influencing jury.*

Where there is evidence to sustain a verdict, the pre-

sumption that it was obtained by improper remarks of counsel does not prevail. *Mullen v. R. Co.* (Tex. Civ. App.), 92 S. W. 1000.

- (i) *Refusal of evidence tending to prove a fact which the law presumes is harmless.*

No reversal can be had for the rejection of evidence tending to prove a fact which the law presumed. *Ganhawer v. R. Co.*, 168 Pa. St. 265, 32 A. 21.

- (j) *Excluding testimony tending to create a presumption cured by conclusion more strongly induced by other proof.*

The exclusion of evidence of a fact only tending to create a presumption, where the conclusion is more strongly induced by other proof, is not sufficient to reverse a judgment. *Talbot v. Talbot*, 25 Ky. (2 J. J. Marsh.) 3.

- (k) *Improper question eliciting what would be presumed was not prejudicial.*

The admission of an improper question, the effect of which is only to elicit what, in the absence of proof, would be presumed, is without prejudice, and is not ground for reversal. *Horton v. Williams*, 21 Minn. 187; *State v. Levy*, 23 Minn. 104; *Beak v. McDowell*, 40 Mo. App. 71.

- (l) *In the absence of all the evidence, it will be presumed that the court did not err in refusing to give requested charge.*

In the absence from the record of all the evidence, it will be presumed that the judge did not err in refusing to give a requested instruction to the jury. *Sammis v. Wightman*, 31 Fla. 100.

- (m) *Where evidence standing alone is not relevant, it will be presumed that other evidence was given, or that jury was instructed to disregard it.*

If evidence is not finally relevant without other evidence, it will be presumed, in the absence of showing, that such other evidence was given, or that the jury was instructed to disregard it. *Preston v. Bowers*, 13 O. S. 1.

- (n) *Inadmissible evidence harmless where it tends to prove that which the law presumes in the absence of proof.*

The admission of inadmissible evidence is not ground of error, where the evidence tends merely to prove that which the law presumes in the absence of proof. *Robinson v. Brewster*, 140 Ill. 649.

- (o) *Improper epithets applied by counsel to opposite party are not presumed to have been prejudicial.*

Where counsel, in his closing argument used improper epithets, applied to the opposite party, the words applying to no facts outside the record, and the court promptly reminded him and fined him for contempt, the words will not be presumed on appeal to have influenced the jury. *Mayer v. Duke*, 72 Texas 445, 10 S. W. 565; so of remarks by one counsel that the other must not like the jury. *Insurance Co. v. Gibbs*, 34 Tex. Civ. App. 131, 78 S. W. 398.

- (p) *When erroneous testimony is stricken out, and jury instructed to disregard same, it is presumed that they did so.*

A new trial should not be ordered on account of erroneous admission of testimony, which the judge subsequently ordered to be stricken out and directed the jury to disregard, if the questions of fact which were submitted to the jury and found in plaintiff's favor entitle him

to recover some amount of damages, in which the amount of the verdict can not be regarded as excessive; in such a case it is clear that the jury may have wholly disregarded the evidence which was stricken out, and it is to be presumed that they did so. *Mandeville v. Guernsey*, 51 Barb. 99.

- (q) *Recalling and charging the jury in absence of plaintiff and his counsel not error, as parties are presumed in court until verdict has been rendered and recorded.*

Recalling and charging the jury in the absence of plaintiff and his counsel is not error, because the parties are presumed to be in court until the verdict has been rendered and recorded. *Cooper v. Morris*, 9 N. J. L. 253, 48 N. J. L. 607, 7 A. 427.

- (r) *Charge that conclusiveness of certain testimony is for the jury to determine, "in view of the testimony and the comments of counsel thereon," not presumed to be prejudicial.*

Where it was charged that the conclusiveness of certain testimony is for the jury to determine, "in view of the testimony and the comments of counsel thereon," and it does not appear what such comments were or by which counsel they were made, the supreme court will not assume that they were prejudicial to plaintiff. *Griffin & Shelly Co. v. Joannes*, 80 Wis. 601, 50 N. W. 785.

- (s) *In action for injuries from defective sidewalk, charge that plaintiff might presume that the sidewalk was safe, not prejudicial.*

In an action against a city for injuries from a defective sidewalk, a charge that plaintiff might presume that the city's duty had been performed by it, and that the sidewalk was in a safe condition for use, was not prejudicial

error, where there was no evidence tending to show plaintiff's contributory negligence. *Howard v. City of New Madrid* (Mo. App.), 127 S. W. 630.

- (t) *Abstract propositions of law, not applicable to facts, when charged to jury, are not presumed to be injurious.*

Abstract propositions of law in a charge, not applicable to the facts, are not presumed to have injured either party, even if inaccurate, and therefore are not ground for exceptions. *Johnston v. Jones*, 66 U. S. (1 Black) 209, 17 L. ed. 117.

- (u) *In action on accident policy, instruction that the injury was presumed accidental was not prejudicial.*

In an action on an accident policy, where it was conclusively shown that the death was accidental, instructions that the injury was presumably accidental, were not prejudicial, even if they were abstractly erroneous. *Allen v. Insurance Co.* (Iowa Sup.), 143 N. W. 574.

- (v) *The mere fact of error does not carry presumption of prejudice.*

The mere fact of error does not carry the presumption of prejudice. *Wiess v. Hall* (Tex. Civ. App.), 135 S. W. 384.

- (w) *Refusal to give correct instruction raises presumption of injury.*

The refusal to give a correct instruction authorizes the presumption that the error was not harmless, unless the case shows that the party complaining was not prejudiced thereby, but the adverse party must show, as a matter of fact, that the error was not prejudicial. *McBride v. Huckins*, 76 N. H. 206, 81 A. 528.

- (x) *Refusal to charge that it was a presumption of law that the injury was inflicted by the last carrier.*

Where, in an action against the initial and connecting carriers for injuries from delay in shipment of live-stock, the jury found against the initial carrier alone; it was a finding that all the delay occurred upon that road, and any error in refusing to charge that it was a presumption of law that the injury was inflicted by the last carrier was harmless. *R. Co. v. Rogers* (Tex. Civ. App.), 124 S. W. 446.

- (y) *Error should be substantial to raise a presumption of prejudice.*

Unless error is so substantial as to raise a presumption of prejudice, it should be disregarded on appeal. *Walter v. Joline*, 120 N. Y. Supp. 1025, 136 App. Div. 426.

- (z) *Instruction applying a presumption of care by deceased, erroneous in using the words, "in the absence of living witnesses," instead of in the absence of direct testimony, not prejudicial.*

In an action for death at a crossing, in which there is no direct evidence as to with what care deceased approached and entered on the crossing, an instruction applying a presumption of care by the deceased, though erroneous in using the words, "in the absence of living witnesses," rather than "in the absence of direct evidence," is not prejudicial to defendant. *Gray v. R. Co.* (Iowa Sup.), 121 N. W. 1097.

- (a-1) *Refusal of instruction that negligence was presumed from accident happening from operation of car while deceased was a passenger.*

Where the complaint for death of a passenger alleged as the direct and only cause of the accident the starting

backwards of defendant's car after it had stopped and while deceased was alighting, and plaintiff's proof was directed only as showing that cause, and the defendant attempted to rebut this only by evidence that deceased got off the car before it stopped, and while it was still going forward, and defendant admitted that, if the accident occurred as claimed by plaintiffs, such backing of the car was negligence and defendant was liable, and plaintiffs admitted if the accident occurred as defendant claimed they had no rights, and the court, without objection, submitted such issue only, with directions to find for plaintiffs or defendant according as they found thereon, refusal of instruction as to presumption of negligence from the accident happening to deceased from the operation of the car while she was a passenger on it, and the giving of an instruction excluding from consideration of the jury any other act of negligence of defendant was immaterial. *Wyatt v. R. Co.* (Cal. Sup.), 103 P. 892.

(b-1) *Instruction that fraud to set aside a sale as against creditors is never presumed.*

An instruction that fraud sufficient to set aside a sale because fraudulent against creditors is never presumed, but must be proved by the party asserting it, and it will not be imputed when the facts from which it is supposed to have arisen may reasonably coexist with honest contention, though misleading, is not ground for reversal. *Montgomery Moore Mfg. Co. v. Leeth* (Ala. Sup.), 50 S. 210.

(c-1) *Inapplicable instructions are presumed to be harmless.*

The supreme court will act on the presumption that instructions in the court below, which were directly irrelevant, could not have misled the jury. *McLain v.*

Winchester, 17 Mo. 49; Oklahoma City v. Meyer, 4 Okl. 686, 46 P 552.

(d-1) *Failure to predicate an instruction on the belief of the jury "from the evidence," was not presumed to be harmful.*

Failure to predicate an instruction on the belief of the jury "from the evidence" will not be presumed harmful. Neeley v. Town of Cameron (W. Va. Sup.), 75 S. E. 113.

(e-1) *In the absence of a bill of exceptions containing the evidence the appellate court will presume it was sufficient to sustain the verdict.*

Where there is one good count in the declaration and a plea thereto, and issue joined thereon, and there is no bill of exceptions showing the evidence adduced on the trial, the appellate court will presume that evidence was sufficient to sustain the verdict rendered in favor of the plaintiff. Myrick v. Merritt, 22 Fla. 335; Palatka & Ind. R. Co. v. The State, 23 Fla. 546.

(f-1) *Presumption of error being prejudicial does not apply to irregularities in apportioning street assessments.*

The principle that in error proceedings, when error is shown it is presumed to be prejudicial, does not apply to irregularities in apportioning improvements' assessments. Ridenour v. Biddle, 10 O. C. C. n. s. 438, 20 O. C. D. 237.

(g-1) *In action on a note, erroneous instruction as to overcoming presumption of innocence of the holder.*

In an action on a note, an instruction that the law presumed in favor of the holder of negotiable paper, that he purchased it for value in the usual course, before due, and was an innocent holder thereof, and that it was not

subject to the defense of fraudulent consideration until these presumptions were overcome by proof, the burden rested on defendant, though it does not state the nature of the proof, is harmless error. *Jones v. Burden*, 56 Mo. App. 199.

(h-1) *Giving instructions, citing volume and page of reports, will not be presumed to be prejudicial.*

While instructions should not be submitted with authorities noted thereon, still prejudice will not be presumed by the mere citation of volume and page of the reports on any of the instructions. *Herzog v. Campbell*, 47 Neb. 370, 66 N. W. 424.

(i-1) *Excluded depositions taken out by the jury are presumed not to have been used.*

Where excluded depositions were taken out by the jury, but, in the absence of any evidence that they were read; held, that the jury must rather be presumed to have considered only the testimony admitted by the court, than to have violated their duty by tampering with what was excluded. *Insurance Co. v. Underwood*, 12 Heiskel (68 Tenn.), 424.

Sec. 106. Questions excluded.

(a) *Sustaining objections to questions without excluding the answers.*

The error, if any, in sustaining objections to questions, without excluding the answers thereto, is harmless. *Mill-sap v. Wolfe*, 1 Ala. App. 599, 56 S. 22.

(b) *Objection to question sustained, testimony sought later given by witness cured objection.*

The alleged fraudulent vendor called as a witness was asked if, when he sold the goods he made an inventory.

An objection to the question was sustained. Elsewhere, in his testimony, he stated that he made no inventory. Held, that the error was cured by witness testifying elsewhere to the same point. *Young v. Harris*, 4 Dak. 367, 32 N. W. 97.

- (d) *In action by bank against cashier for making unfortunate loan exclusion of question as to custom by other banks.*

In an action by a bank against the cashier for making an unfortunate loan, the exclusion of a question put by defendant to a witness as to a custom prevailing in another banking house is not prejudicial error, when defendant is himself allowed to testify fully as to the custom. *Bank v. Bours*, 73 Cal. 200, 14 P. 673.

- (e) *Sustaining objection to question, whether motorman would have moved the car had he supposed he was thereby endangering lives of deceased and other bicycle riders.*

Where, in an action for the death of a bicycle rider caused by a collision with a street car, the motorman testified that he had moved his car because he thought he had plenty of time, and that it was dangerous for him to stop the car at that time, the sustaining of an objection to the question as to whether a motorman would have moved the car if he had supposed that he was thereby endangering the lives of deceased and other bicycle riders on the street was harmless. *Harrington v. R. Co.*, 140 al. 514, 74 P. 15, 63 L. R. A. 238.

Sec. 107. Receipts.

- (a) *In action against county treasurer refusal to allow defendant to show that receipt was not delivered.*

In an action against a county treasurer and the sure-

ties on his bond for failure to pay over to his successors a balance shown by his official accounts, where a receipt from the treasurer to his predecessor claimed to have been found in the treasurer's office is read in evidence, the refusal to allow defendant to show that the receipt was not delivered, and was not filed in the treasurer's office, is harmless, where there is other evidence to show that the treasurer had acknowledged receiving the sum named in the receipt. *Doll v. People*, 145 Ill. 253, 34 N. E. 413, affm'g judgm't, 48 Ill. App. 418.

(b) *Admitting parol evidence of a receipt without laying the proper foundation.*

Though the court erred in admitting parol evidence of the contents of a receipt, in the nature of a contract, when the proper foundation was not laid, where the only witnesses testifying to such receipt were plaintiff and defendant, and in their evidence they agreed, in every respect, the judgment will not be reversed. *McGregor v. Filer*, 69 Ill. 514.

(c) *Testimony affecting validity of a warehouse receipt.*

On the issue of notice to the buyer of a warehouse receipt of the previous discharge of the employee signing it, testimony of the employee that, after the buying, he told the buyer that the seller of the receipt had no wheat in the warehouse, was not prejudicial, it simply showing the buyer that something was wrong with his receipt. *McNear v. Bourn*, 122 Cal. 621, 55 P. 596.

(d) *In action by firm for balance due, charge that receipt would not bind if any sum was still due.*

There was no reversible error in an action in the name of the firm of which plaintiff was a member to recover a certain sum, the balance claimed to be due from defendant for filling dirt, etc., under a written contract in

which plaintiff claimed that defendant conspired with two other partners to settle the claim for \$9,000, when \$19,000 was due, in admitting the receipt for \$9,000, executed by the other partners in full discharge of the contract with the firm, where the court charged that the receipt would not bind the firm if any sum was still due under the contract, and, if so, plaintiff could recover such balance. *Storrie v. Ft. Worth Stockyards Co.* (Tex. Civ. App.), 143 S. W. 286.

Sec. 108. Refusal to allow refreshment of recollection from affidavit.

(a) *Refusal to allow physician to refresh his recollection from an affidavit.*

Where a physician's day-book was in evidence before the jury, and on his examination the court refused to allow him to refresh his memory as to the dates of certain treatments from an ex parte affidavit previously made by him, the action of the court was not prejudicial, though the witness did not tell the exact dates, he accomplished the same thing by stating that these treatments were entered in the day-book. *Winn v. Modern Woodmen of America*, 157 Mo. App. 1, 137 S. W. 292.

Sec. 109. Refusal to strike out evidence.

(a) *Improper refusal to strike certain testimony.*

Where defendant, in replevin, testified that he learned from a letter from the party from whom he purchased the property that such party had owned it but a short time, and could not tell when or from whom he got it, error in refusing to strike out such testimony will not work a reversal, defendant having testified that he knew, of his own knowledge, that the party had owned the property but a short time, and would not likely be able to give much information concerning it. *Redman v.*

Peirsol, 39 Mo. App. 173; Kendrick v. Towle, 60 Mich. 363, 27 N. W. 567, 1 Am. St. Rep. 526; In re Fuller's Est., 110 Minn. 213, 124 N. W. 994.

(b) *Refusal to strike improper evidence where sufficient proper evidence is left to support the question.*

The refusal to strike out improper evidence is harmless, where there is sufficient proper evidence in support of the same question. Treat v. Reilly, 35 Cal. 129; Manning v. Denn (Cal.), 24 P. 1092; Snyder v. Snyder, 50 Ind. 492; Lerche v. Brasher, 104 N. Y. 157, 10 N. E. 58.

(c) *Error in admitting and refusing to strike out cured by instruction to disregard.*

Error in the admission of evidence and the refusal of the court to strike out such evidence is rendered harmless by an instruction to the jury not to consider the same. Holland v. Huston, 20 Mont. 29, 49 P. 390; Matters v. Frankel, 47 St. Rep. 507, 55 Hun 203, 20 N. Y. Supp. 145, affm'd 157 N. Y. 603.

(d) *Refusal to strike out an unresponsive answer to question.*

Under Code of Civil Procedure, sec. 475, defendants held not entitled to a reversal, because of a wrongful ruling refusing to strike out a non-responsive answer to a question. Bird v. Utica Gold Mine Co. (Cal. App.), 84 P. 256.

Sec. 110. Res gestae.

(a) *Receiving as part of the res gestae a statement of a driver that an automobile ran into his vehicle.*

Where there was no dispute that an automobile ran into a vehicle frightening the horse and injuring the driver, any error in admitting, as a part of the res

gestae, a statement of the driver that an automobile ran into the vehicle, was harmless. *Stowell v. Hall* (Ore. Sup.), 108 P. 182.

(b) *Admitting statement of engineer as a part of the res gestae.*

Where, in an action for injuries to a passenger by the derailment of the train, the engineer testified that he might have made a certain statement, the error, if any, in admitting evidence of the statement as a part of the res gestae was not prejudicial. *Shelton v. R. Co.*, 86 S. C. 106, 67 S. E. 899.

(c) *Error as to res gestae statement cured when person denies it.*

Error in admitting in evidence a statement made by a person, on the theory that it was a part of the res gestae is rendered harmless, where the person was a witness at the trial and denied making any such statement. *Clack v. Southern Electric Supply Co.*, 72 Mo. App. 506.

(d) *Admission, though not part of res gestae, not error.*

Although to allow plaintiff to prove a statement of defendant when plaintiff fell, "how did that d—d fool fall down there?" is not part of the res gestae, yet if it bears on the issues its admission is not error, and where the answer is a general denial, thus denying that plaintiff had fallen, here is an admission of defendant on that issue. *Schaal v. Heck*, 17 O. C. C. 38, 8 O. C. D. 595, affm'd w. o. 54 O. S. 618.

Sec. 111. Rules and regulations.

(a) *Evidence that witness had never seen or read any rules providing for the inspection or repair of tools.*

Where, in an action for injuries to a servant, the jury

were correctly charged as to the acts and omissions of defendant, on which fault might be predicated, the failure to post rules not being one of them, defendant was not prejudiced by evidence that witness had never seen or read any rules providing for the inspection or repair of tools in the tool-shop, objected to because there was no charge in the complaint covering such question. *R. Co. v. Garcia* (N. Y.), 152 F. 104, 81 C. C. A. 322.

(b) *Admission of the rules of the Secretary of War regulating the driving of logs in a river.*

The admission of the rules of the Secretary of War regulating the driving of logs in a river, if erroneous, held to be harmless under the instructions, in an action for erosion of land caused by the jam. *Johnson v. Thomas Irvine Lumber Co.*, 75 Wash. 539, 135 P. 217.

(c) *Improper admission of railroad rule as to freight trains following each other.*

While a trespasser may have had no right to rely upon a rule requiring freight trains following each other to keep ten minutes apart, the error, if any, in permitting the rule to be read was harmless, as it had already brought out on the cross-examination the fact that the rule was in existence. *R. Co. v. Kemery's Adm'r*, 23 Ky. L. R. 1734, 66 S. W. 20.

(d) *Erroneous rejection of two rules of defendant company.*

Where the court erroneously rejected two rules of the defendant company offered by the plaintiff, to the effect that after a car is stopped, it should only be started on a signal from the conductor, after a passenger has alighted; it could not have prejudiced the cause of plaintiff, where the court charged that, if the car was started, after it had stopped and while plaintiff was alighting, she

was entitled to recover a verdict. (Neb.) *Frizzell v. R. Co.*, 124 F. 176, 59 C. C. A. 382.

- (e) *Rule that one erroneous instruction may be shown to have been corrected by a subsequent instruction, should be applied with caution.*

The rule that one erroneous instruction may be shown as having been corrected by a subsequent instruction, and hence that the error is harmless, is not unattended with hazard, and should be applied with caution. *Brown v. Willoughby*, 5 Col. 1.

- (f) *Exclusion of book of rules of railroad cured by charge to jury.*

In an action by an employee of a railroad company for injuries received while riding on the engine by the falling of a rock from the roof of a tunnel caused by a projection on a car in front of the engine, the exclusion of a book of rules prescribing the persons who should be allowed to ride on the engine, is not ground for complaint, where the court instructed that there could be no recovery, whether or not there was any rule prohibiting plaintiff riding on the engine, if the engine was obviously and necessarily a dangerous place to ride, and plaintiff voluntarily exposed himself there, and was in the discharge of no duty, and if he would not have been injured had he been in the caboose. *R. Co. v. Beaton* (Mont.), 64 F. 563, 12 C. C. A. 301, writ of error dismissed, 17 Sup. Ct. 997, 41 L. Ed. 1185.

- (g) *Charge failing to recognize the exception to the rule.*

A failure to recognize an exception to the general rule stated in the instruction can not be relied on as error, unless the evidence tends to make a case within the exceptions. *Brewster v. Crossland*, 2 Col. App. 446, 31 P. 236.

- (h) *Instruction to jury to disregard cured erroneous admission of rule of railroad company.*

Though the erroneous admission of a rule of the railroad company, in an action against it for personal injuries, was prejudicial, the subsequent admonition of the court to the jury that the rule was not competent, and should be disregarded, cured the error. *R. Co. v. Covington*, 15 Ky. L. R. (abst.) 653.

Sec. 112. Self-serving allegations and statements.

- (a) *Admission of statements by defendant not bearing on his liability.*

In an action for recovery under a contract, the admission of statements by the defendant which have no bearing upon the question of his liability are not prejudicial, notwithstanding they were not made in the presence of the plaintiff, and were self-serving. *Monroe & Co. v. Peebles*, 13 O. C. C. n. s. 174, 3. O. C. D. 373.

- (b) *Refusal to strike, as self-serving, allegations from the petition.*

Any error in refusing to strike as self-serving allegations averments of the petition in an action on a fire policy, that plaintiff submitted to an examination under oath by the company, and had offered to arbitrate the amount of the loss, would not be material after verdict for plaintiff. *Hilburn v. Insurance Co.*, 140 Mo. App. 355, 124 S. W. 63.

- (c) *In action for injuries, admission of self-serving declaration of plaintiff that he was not at fault.*

In an action for injuries in an elevator shaft, the erroneous admission of self-serving declaration, in which the plaintiff stated that he was not at fault, and one of the defendants that he supposed that the elevator operator

“didn’t think,” was not prejudicial to defendant. *Eilerman v. Farmer* (Ky. Ct. App.), 118 S. W. 289.

Sec. 113. Stenographers and stenographic notes.

(a) *Permitting stenographer to read notes of former trial.*

Where the evidence given by defendant’s witnesses on a former trial was substantially the same as that given on the last trial, any error in permitting the stenographer to read the testimony given at the former trial was harmless. *Warner v. R. Co.*, 62 Mo. App. 184.

(b) *Exclusion of stenographic notes of testimony of witness on a former trial.*

Where the trial court refuses to permit a stenographer to read the notes of the testimony of a witness on a former trial in evidence, but permitted him to give the testimony by using the notes to refresh his memory, the exclusion of the stenographic notes was not prejudicial. *R. Co. v. Young*, 108 Va. 784, 62 S. E. 961.

(c) *Forbidding stenographer to take down question repeatedly propounded by one of the counsel.*

After counsel had taken much time in attempting to introduce evidence which had been ruled out, the court said that a question which he asked should not be taken down, and that no more questions on that point would be allowed, since the record on that issue was complete. Held, not prejudicial. *Crowell v. McGoon*, 106 Iowa 266, 76 N. W. 672.

Sec. 114. Stipulations between the parties.

(a) *In a suit to rescind a contract for the sale of land, etc., it was harmless error to admit the stipulation in evidence.*

Where the parties to a suit to rescind a contract for

a sale of land and corporate stock, stipulated that defendant corporation had published a prospectus of its lands, one of which plaintiff received, it was harmless error to admit the stipulation in evidence over defendant's objection that the prospectus was incompetent, where the prospectus itself was not offered. *Owen v. Pomona Land, etc., Co.* (Cal. Sup.), 61 P. 472.

(b) *Admission in evidence of offer by defendant to pay a large sum in addition to insurance company.*

Admission in evidence of a stipulation between the parties which, upon its face, is immediately admissible in evidence, and which contained a declaration that defendant had offered to pay the owner of the premises a large sum in addition to the insurance money is not prejudicial to the defendant, where the court instructed the jury, at defendant's request, that "said offer was, of itself, neither an admission that the defendant had been guilty of negligence, nor that defendant had caused the fire, nor that anything was due to the owner of the premises or the plaintiff by reason of the fire." *Insurance Co. v. R. Co.*, 125 Cal. 434, 58 P. 55.

Sec. 115. Testamentary capacity.

(a) *Non-expert witness testifying that she had never seen testatrix do or say anything inconsistent with a sound mind.*

Witness having, without objection, testified that testatrix was mentally sound and all right, admission of her testimony that she had never seen testatrix do or say anything inconsistent with a sound mind, if improper, under the rule that a lay witness must base an opinion of a person's sanity on things testified to by such witness, was harmless. *In re Esterbrook's Est.*, 83 Vt. 229, 75 A. 1.

- (b) *Admitting question, "You may also further state whether or not he, the testator, had capacity to form a purpose and intention of disposing of his property by will?"*

In a proceeding in contest of a last will and testament, the question, "You may also further state whether or not he, the testator, had capacity to form a purpose and intention of disposing of his property by will?" does not come within the rule of inhibition laid down by this court in the case of *Runyan v. Price*, 15 O. S. 1, and the admission of such testimony by the trial court is not error justifying the setting aside of the verdict of a jury sustaining the validity of the last will and testament. *Dunlap v. Dunlap*, 89 O. S. 28.

- (c) *Where jury found testator lacked testamentary capacity erroneous instruction on the subject was harmless.*

Where the answers to special interrogatories returned with a general verdict, finding a testator of unsound mind and setting aside his will, show that he clearly lacked testamentary capacity, error of the court in its instructions upon that subject is not cause for reversal. *Cline v. Lindsey*, 110 Ind. 337, 11 N. E. 441.

- (d) *Evidence of undue influence unimportant, where jury expressly found decedent had not testamentary capacity.*

A judgment involving the validity of a will, will not be reversed for error in the admission of evidence tending to establish undue influence; where the jury had expressly found that the decedent had not testamentary capacity, as in such case the appellant is not prejudiced. *Petrie v. Petrie*, 126 N. Y. 683, 38 State Rep. 496, affm'g 2 Silv. Sup. St. 438, 25 St. Rep. 309, 6 N. Y. Supp. 831.

- (e) *Evidence that attorney who drew will asked for opinion as to competency of testator to execute it.*

Where, in an issue of testamentary capacity, the attorney who drew the will in controversy was fully cross-examined, and the court charged as to the degree of intelligence necessary, contestant was not prejudiced by a question asked of such attorney, as to whether testator, at the time he made the will, was mentally and physically competent to execute it, though the question might be construed as calling for the attorney's opinion on a question of law. *Sibley v. Morse*, 146 Mich. 463, 109 N. W. 858, 13 D. L. N. 878.

- (f) *In a suit to set aside the probate of a will, instruction that if testator, as to the subjects connected with the testamentary disposition of his property, was not of sound mind, etc.*

Where, in a suit to set aside the probate of a will, on the ground of mental incapacity, the jury specially found that testator did not have sufficient mind and memory to transact ordinary business affairs of life, the error in an instruction that if testator, as to the subjects connected with the testamentary disposition of his property, was not of sound mind, the will was not valid, claimed to be erroneous because there was no evidence of delusion or any lack of mental capacity as to the subjects connected with the testamentary disposition, other than a general mental incapacity, was not prejudicial. *Healea v. Keenan*, 244 Ill. 484, 91 N. E. 146.

- (g) *Refusal to allow accounts and receipts of testator to go to jury room, as bearing on the question of mental capacity.*

In an action to contest the validity of a will, certain accounts and receipts written by the testator were intro-

duced as bearing on his mental capacity. The judge refused to allow the jury to take these out, and the refusal was excepted to and assigned for error. The papers should regularly have been permitted to go with the jury, but substantial justice had been done by the verdict. Held, that there was no ground for reversal. *McCully v. Barr*, 17 Sergeant & Rawle (Pa.) 445; *Price v. Insurance Co.*, 54 Mo. App. 119.

Sec. 116. Written evidence.

(a) *Admitting an affidavit in evidence.*

Where every independent fact stated in an affidavit was testified to by a witness, and most of them shown to be true, an affidavit could have added nothing thereto, and though objectionable, its admission was harmless error. *Wiess v. Hall* (Tex. Civ. App.), 135 S. W. 384.

(b) *Admitting unsigned application in an action for commission for securing a loan.*

The admission, in an action for a commission for securing a loan, of an unsigned application, even if erroneous, was not prejudicial. *Thorne v. Barth*, 114 N. Y. Supp. 900.

(c) *In action for fall of negligently constructed building, admission in evidence of the building laws.*

In an action for damages caused by the fall of a building negligently constructed, the admission in evidence of the building laws was immaterial, but could not affect the rights of defendant, as the laws of the state may be referred to without being put in evidence. *Hine v. Cushing*, 53 Hun 519, 6 N. Y. Supp. 850.

(d) *When improper admission of foreign laws in evidence is harmless.*

The admission of foreign laws in evidence, though

without an averment, is not ground of error where they are like those of the state; the error is harmless. *Forsyth v. Vaxter*, 2 Scam. (Ill.) 9.

(e) *Admission of society's constitution on identification by witness not qualified to testify thereto.*

Admission in evidence of a society's constitution on identification by agents not qualified to testify thereto was harmless error, where the same facts were also sworn to by a fully competent witness. *Ga. Temple & Tabernacle of K. & D. of Tabor v. Johnson* (Tex. Civ. App.), 135 S. W. 173.

(f) *Admission of telegram in evidence.*

Error could not be predicated on the admission in evidence of a telegram, where everything contained therein was shown by other undisputed evidence. *Taylor Bros. v. Hearn* (Tex. Civ. App.), 133 S. W. 301.

(g) *In action on benefit certificate, defended on the ground of suicide, admission of verdict of coroner's jury.*

The admission of evidence, in an action on a benefit certificate, defended on the ground of suicide, of the verdict of the coroner's jury, over the objection of plaintiff, was not prejudicial to insurer, where the verdict, prima facie, showed death by suicide. *Tomlinson v. Woodmen of the World* (Iowa Sup.), 141 N. W. 950.

(h) *Improper paper to jury harmless when fact proved by other and competent evidence.*

The permission of an improper paper to go to the jury is not ground of error, where there was other competent evidence to prove the facts which the jury might infer from the paper. *McGraw v. Patterson*, 47 Ill. App. 87.

(i) *Admission of marriage contract not prejudicial error.*

In an action on a note, which was based upon a valid and sufficient consideration, the admission, as part of the evidence, of the marriage contract which related to the same transaction, was not prejudicial error. *Skinner v. Skinner's Ex'r*, 77 Mo. 148.

(j) *Letter admitting willingness to accept a less sum than sued for not injurious to defendant.*

In an action by a real estate broker to recover \$3,125 as commissions on a sale of lands, in which defendant claimed that the compensation agreed upon was \$1,250, defendant could not complain of the admission of a letter written by plaintiffs before the final negotiations as to commissions were made, agreeing to take \$1,250 as their commissions, as it was favorable to him. *La Chapelle v. Ricker*, 154 Mo. App. 500, 135 S. W. 957.

(k) *Admitting in evidence drawings of a sheave wheel.*

The admission in evidence of a drawing representing a sheave wheel, where the breaking of which was alleged to have caused the death of plaintiff's intestate was not prejudicial error, although they were not correct drawings of the wheel in question, where such fact was stated to the jury, and they were used only to illustrate the testimony of witnesses, and where an accurate drawing made to scale was introduced by defendant. (*Alaska*) *Alaska-Treadwell Gold Min. Co. v. Cheney*, 162 F. 593, 89 C. C. A. 351.

(l) *Admitting incomplete ordinance in evidence was harmless.*

The erroneous admission in evidence of an incomplete ordinance, which was not necessary to plaintiff's case, and did not in any way strengthen his position, was harmless.

Wills v. R. Co., 133 Mo. App. 625, 113 S. W. 713; Brownell & Wright Car Co. v. Barnard, 116 Mo. 667, 22 S. W. 503; Same v. City of St. Louis, 152 Mo. 65, 54 S. W. 463.

(m) *Error in admitting document not sufficiently important to justify a reversal.*

Where a document objected to was offered, "together with other evidence in depositions, and all witnesses examined on the trial in open court, showing the same matters," and it does not appear that, concerning these matters, inconsistent or conflicting evidence was offered, the error in admitting such document was not of sufficient importance to justify a reversal. Atlas Distilling Co. v. Rheinstrom (Ill.), 86 F. 244, 30 C. C. A. 10.

(n) *Erroneous admission of unstamped instrument.*

An erroneous admission in evidence of an instrument which, because not properly stamped, was inadmissible under the provisions of the War Revenue Act of 1898, was harmless, where the instrument was set out in the complaint, and its terms were not disputed, the only issue thereon made by the pleadings being, as to the authority of the agent to execute the same on behalf of the defendant. Frank Waterhouse v. Rock Island Alaska Min. Co., 97 F. 466 (Wash.) 38 C. C. A. 281.

(o) *Admission of certain papers in evidence not prejudicial error.*

In an action on a contract under seal, purporting to have been made with defendants by A, as agent and attorney in fact of plaintiffs, the plaintiffs offered in evidence a letter of attorney from themselves to A, and an instrument in writing purporting to be a ratification of the same. Defendants objected to the admission of the papers for the reasons stated, but their objection was

overruled and the evidence received. After verdict and judgment for plaintiffs, defendants took a writ of error, assigning the admission of the papers. Held, that as the papers were not necessary to show A's agency, this fact, if necessary to be shown at all, being sufficiently admitted in the agreement sued on, defendants were not injured by the admission of the paper in evidence, and hence judgment would not be reversed. *Johns v. Battin*, 30 Pa. St. 84.

(p) *In action on bond of contractors for heating plant, error in admitting report of officers as to adequacy thereof.*

In an action on the bond of contractors who undertook to put in a heating plant in a school building, with guaranty of the heating capacity of the plant, the contract providing that an officer of the school board should be the sole judge of the question whether the capacity was adequate, the admission of reports to such officers on the subject of the adequacy of the plant, made by appointees of the board, though erroneous, was not cause for reversal. *Bd. of Ed. of City of St. Louis v. Nat. Surety Co.*, 183 Mo. 166, 82 S. W. 70.

(q) *Admission of privileged communication to prove defendant a stockholder.*

In an action to recover assessments on the stock of a stockholder, tried to the court without a jury, a privileged communication was erroneously admitted to prove that the defendant was a stockholder. The court held that he was a stockholder, but the finding of fact showed that this decision was based upon other competent evidence. Held, that the admission of the privileged communication was harmless error. *Leggett v. Glenn (Mo.)*, 51 F. 381, 2 C. C. A. 286.

(r) *Improper reception of letter not prejudicial.*

Where the only question in an action for negligence is the extent of the injury caused, the introduction of a letter written by plaintiff to the defendant some days after the accident notifying defendant that if any damages resulted from certain acts which were contemplated by the defendant the latter would be held responsible, is not reversible error, the court especially charging the jury that plaintiff had failed to connect defendant with the injury, and that they should disregard the letter. *Hopper v. Empire City Subway Co.*, 78 App. Div. 637, 79 N. Y. Supp. 907, *affm'd*, 178 N. Y. 587; contract and breach being established by other evidence, *Stearn v. Sheppard & Morse Lumber Co.*, 91 App. Div. 49, 86 N. Y. Supp. 391; where contract construed according to its provisions, *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 183, 75 P. 787.

(s) *Erroneous admission of report of street railway employees.*

In an action for injuries to plaintiff as a passenger upon its street railway line, the erroneous admission of reports made by the company at a time prior to the accident, under sec. 57 of the railroad law, for the purpose of showing that the defendant was operating the street railway, is not cause for reversing a judgment for plaintiff, if the proof shows that the conductors of the defendant company were upon the car taking fares at the time of the accident. *Powell v. R. Co.*, 88 App. Div. 133, 84 N. Y. Supp. 337.

(t) *Admission of day-book kept by defendant.*

In an action to cancel a note and mortgage, on the ground that they were given to secure a loan which defendant agreed to make to plaintiff, but that no money

was ever, in fact, advanced by defendant to plaintiff thereunder. Defendant testified that the consideration of the note and mortgage was goods previously sold and delivered by him to plaintiff. In rebuttal plaintiff introduced a day-book, admitted by defendant to have been one of the books kept by him in his mercantile transactions. It contained a long account with plaintiff, consisting of items, charges and credits. Held that, under the circumstances, such book was admissible, at least it was not error for which the judgment should be reversed. *White v. Pendry*, 25 Mo. App. 542.

(u) *Admission of instrument acknowledging indebtedness for horses.*

In an action on a note and to foreclose a lien securing it, the complaint alleged that the consideration of the note was the conveyance by plaintiff to defendant, at his request, of certain land in payment of the purchase price of horses sold defendants by the grantee, and that defendants, to secure the indebtedness, executed a contract giving plaintiff a lien on the horses, and the defense was that the horses were sold to defendants by plaintiff, through a brother, his agent, who made false representations in regard to their breed and condition, and defendants asked for a rescission of the contract of sale. Held, that the admission on behalf of plaintiff of the instrument signed by defendants acknowledging that they were indebted to plaintiff in the amount of the note "for the list of horses attached, that we have this day bought of you," and providing for the repayment of the amount from the proceeds of the sales of the horses, was harmless error. *Robinson v. Siple*, 129 Mo. 208, 31 S. W. 788.

(v) *Admission of letter that defendant elected to cancel contract.*

Where plaintiff, in an action for the breach of an ad-

vertising contract, as a part of its main case introduced evidence showing a rescission of the contract, the admission of the letter, as part of defendant's defense, notifying plaintiff that defendant elected to cancel and rescind the contract, was harmless. *Peck v. K. C. Metal Roofing & Corrugating Co.*, 96 Mo. App. 212, 70 S. W. 169.

(w) *Admission of argumentative letter stating no fact.*

Admission of part of a letter from plaintiff to defendant not stating any fact, but merely making an argument in their favor, which they or their attorneys might have made at the proper time, is harmless. *Baker v. Pulitzer Pub. Co.*, 103 Mo. App. 54, 77 S. W. 585.

(x) *Admitting testator's check book in evidence.*

In an action by a bank on a note against the executors of the testator, whose name was signed to it, and which it was claimed was a forgery, the fact that the check book of the testator did not contain any entry of the amount of the note sued on did not render its admission in evidence prejudicial, where the other evidence showed that such an entry was not to be expected in such book. *Bank v. Wisdom's Ex'r*, 111 Ky. 135, 23 Ky. L. R. 530, 63 S. W. 461.

(y) *Admitting assessment rolls as to damages to property.*

In an action for breach of warranty of title by a loss of part of the land under superior title, where the assessor has testified as to the damage to the property, in his opinion, and as to his reason for such opinion, it is not prejudicial error to admit the assessment rolls, merely showing that he had acted on such information, though the rolls themselves were not admissible to prove the damage. *Louisville Public Warehouse Co. v. James*. 24 Ky. L. R. 1266, 70 S. W. 1046.

- (s) *Improper admission of letter from defendant to alleged wrongdoer charging him with causing the injuries.*

Where, in an action against a railroad company for injuries received by plaintiff by being struck in the night by a mail bag ejected from a passing train by the mail agent, a letter written by defendant's attorney to the mail agent, stating that his act and negligence caused the injury, and that he would be held liable for any verdict recovered, and offering him control of the suit, was received in evidence, a verdict for plaintiff would not be disturbed therefor, since the letter contained no admission of liability, and hence, could not have damaged defendant. *Shaw v. R. Co.*, 123 Mich. 629, 41 L. R. A. 308, 81 Am. St. Rep. 230, 7 D. L. N. 77.

- (a-1) *Admission of letter from superior officer that if assured was unheard from for seven years claim for insurance was good.*

Where, in an action on a life policy, based on assured's disappearance and the failure to hear from him for over seven years, the admission of a letter by a superior officer, to the effect that if assured was not heard from for seven years the claim would be good, did not affect the verdict, the error in admitting the letter was not prejudicial. *Hagany v. National Union*, 143 Mich. 186, 106 N. W. 700, 12 D. L. N. 943.

- (b-1) *Admitting plaintiff's book showing amount of lumber.*

In an action for the price of lumber, where there was a written estimate prepared showing the number of pieces and the sizes and lengths required, and to determine the amount simply required a mathematical calculation, any error in the admission of plaintiff's books to show the amount was harmless. *Rathbun v. Allen*, 135 Mich. 699, 98 N. W. 735, 10 D. L. N. 938.

(c-1) Admission of plat of dedication of municipality.

Where, in an action against a city for injuries on a defective street, the city, in its answer, admitted its existence as a domestic municipal corporation, the admission in evidence of a plat of dedication of the municipality, which failed to locate defendant in any particular place, but did locate it in a township, was not prejudicial to the city. *Scheffler v. City of Hardon*, 140 Mo. App. 13, 124 S. W. 569.

(d-1) Erroneous admission of map corrected by other evidence.

In ejectment, the admission of a map over objection that it did not show or tend to show the location of the disputed premises, though erroneous, is without prejudice, where there was other evidence on the same point sufficient to sustain the verdict. *Fish v. R. Co.*, 84 Minn. 179, 87 N. W. 606.

(e-1) Introduction of account book cured by instruction to jury.

Where the sole question was, whether lumber furnished a carpenter to improve defendant's house should be charged to defendant, and whether defendant obligated himself to pay for it, and the court so charged, erred in permitting plaintiff to introduce an account book, kept by himself, showing that the lumber was charged to defendant, was cured by an instruction that the fact that the charge was made to defendant was important only in case the jury should find that it was charged by the authority, or with the assent, of the defendant. *Temple v. Goldsmith*, 118 Mich. 172, 76 N. W. 324, 5 D. L. N. 452.

(f-1) *Reception of book of accounts to prove physician's visits.*

Where, in an action to recover for services as a physician plaintiff testified that he made a certain fixed number of visits, error in admitting a book of accounts showing the same number of visits was harmless. Pickler v. Caldwell, 86 Minn. 133, 90 N. W. 307.

(g-1) *Admitting letter inclosing certain leases.*

Any error in admitting in evidence a letter inclosing leases was harmless, where it was admitted that there was a delivery of the leases to the addressee in some manner. Ver Steeg v. Becker-Moore Paint Co., 106 Mo. App. 257, 80 S. W. 346.

(h-1) *Bank books put in evidence without objection may be considered by the jury.*

Where bank deposit books have been admitted in evidence without objection, their contents are before the jury for consideration, and it is not prejudicial error for the trial court to permit the bank teller to read their contents to the jury, though he has no personal knowledge as to part of the entries. Keith v. Wells, 14 Col. 321, 23 P 991.

(i-1) *Erroneous admission of advertisement soliciting goods for storage.*

In an action against the owner of a cold storage warehouse, in which plaintiff had stored celery, for failure to keep the warehouse at an even and uniform temperature, where the principal issue of fact is, as to whether the plaintiff was told by defendant's manager that the temperature would be uniform, the admission of an advertisement soliciting goods for storage, and stating that the temperature was kept uniform was not prejudicial.

Rettner v. Minnesota Cold Storage Co., 88 Minn. 352, 93 N. W. 120.

(j-1) *Admission of note books containing an indistinct description of property of defendant placed in plaintiff's hands to trade.*

The admission in evidence of plaintiff's note-books containing an indistinct description of property of defendant placed in plaintiff's hands to trade, was not prejudicial to defendant, since it did not support the theory either of plaintiff's being employed as a broker or that it was through plaintiff's efforts that the deal was finally made, which were the only questions of fact litigated. Knowles v. Harvey, 10 Col. App. 9, 52 P 46.

(k-1) *Reports of commercial agency received in evidence.*

Where the reports of a commercial agency are received in evidence, containing a certain letter admissible in evidence, and such evidence is not disputed, the rejection of such letter when offered in evidence by itself is not prejudicial error. Repauno Chem. Co. v. Victor Hardware Co. (Colo.). 101 F. 948.

(l-1) *Admitting in evidence X-ray photographs of a personal injury.*

Any error in admitting X-ray photographs of a personal injury was harmless, where the condition shown thereby was the same as that disclosed by expert testimony. Kimball v. N. Electric Co. (Cal. Sup.), 113 P. 156.

(m-1) *Admitting photographs of part of a hotel-register.*

Where the fact that persons registered at a certain hotel was expressly testified to by a party, the error, if any, in admitting photographs of the register showing the names of such persons, was not prejudicial to such

party. Fuller v. Robinson, 230 Mo. 22, 130 S. W. 343; Philes v. R. Co., 141 Mo. App. 561, 125 S. W. 553.

(n-1) *In action for injuries, admitting in evidence of photograph of railroad wreck.*

Where a defendant carrier did not deny its liability for injuries to plaintiff, a passenger, the issue being the amount of damages, the admission in evidence of a photograph of the wreck was not prejudicial error. Taylor v. R. Co (Wash. Sup.), 120 P. 889; Morris v. R. Co., 239 Mo. 695, 144 S. W. 783.

(o-1) *In action for wrongful death, admission of photograph of the deceased, taken after death.*

In an action for injuries resulting in death, the admission of a photograph of the deceased, taken after his death, if error, was harmless, where the photograph could only affect the measure of damages, and the recovery was clearly not excessive. Murray v. Omaha Transfer Co. (Neb. Sup.), 145 N. W. 360.

(p-1) *Receiving in evidence photograph of insured not shown to have been exhibited to the jury.*

The admission in evidence, in an action on a life-insurance policy, of a photograph of insured to rebut testimony as to the appearance of insured as to her health about the time the photograph was taken, is not ground for reversal, it not being shown that it was exhibited to the jury or what use was made thereof. Nat. Life Mut. Ins. Co. v. Whitacre, 15 Ind. App. 506, 43 N. E. 905.

(q-1) *Permitting a record book kept by a witness, and used to refresh his recollection, to go to the jury room.*

Error in permitting a record book kept by a witness, and used by him to refresh his recollection, to go to the jury as evidence, was harmless, where the witness testi-

fied to the facts in his own knowledge, independently of the record, after refreshing his memory therefrom. *R. Co. v. Diffendal*, 109 Md. 494, 72 A. 193; rehearing denied, 109 Md. 494, 72 A. 458.

(r-1) *Admission of surveyor's certificate attached to plat of land.*

Although a surveyor's certificate attached to a plat of land is hearsay, its admission was harmless, where the surveyor who prepared the plat testified that it was correct, it being improbable that the jury were influenced by the certificate. *Martin v. Ince* (Tex. Civ. App.), 148 S. W. 1178.

(s-1) *Admission of parol evidence of writing cured by admission afterwards of the writing.*

The admission of parol or secondary evidence of the contents of a writing becomes harmless where the writing is afterwards introduced. *Emmlaw v. Insurance Co.*, 108 Mich. 554, 66 N. W. 469; *Gould v. Young*, 143 Mich. 572, 107 N. W. 281, 13 D. L. N. 60; *Beckwith v. Talbot*, 2 Col. 639.

(t-1) *Admitting in evidence copy without sufficient proof of loss of the original.*

If a copy of certain evidence was admitted without sufficient proof of loss of the original, but a copy of its contents is not disclosed, no prejudice is made to appear. *Dudley v. Iron Co.*, 13 O. S. 168.

(v-1) *Admitting carbon copy of letter, without accounting for the absence of the original.*

Where a carbon copy of an important letter was introduced and admitted in an action to quiet title, without accounting for the absence of the original, the error therein, if any, was subsequently cured by prima facie

evidence that the original had been destroyed. *Loving v. Maltbie* (Wash. Sup.), 116 P. 1086; *Garlick v. Morley* (Wis. Sup.), 132 N. W. 601.

(w-1) *Copies admissible, when originals set forth in petition and admitted by answer.*

It is harmless to admit copies of papers, without requiring the originals to be accounted for, when the petition sets out their contents, and the answer admits them as set out. *Valle v. R. Co.*, 37 Mo. 445; *Thomas v. Walnut Land & Coal Co.*, 43 Mo. App. 653.

(x-1) *Error in admitting certified copy of certificate of land warrant.*

Although the record of a certified copy of a certificate of land-warrant location, including the assignment indorsed on the certificate, is inadmissible in evidence, being only the copy of a copy, yet the error of admitting it is harmless, when the assignment was otherwise proved, without objection, and when the party objecting to such record claimed title through a deed from the original locator, and had purchased with actual notice of the assignment. *Hoge v. Hubb*, 94 Mo. 489, 7 S. W. 443.

(y-1) *Letter-press copies correctly introduced when party having refuses to produce originals.*

It was not prejudicial error to admit the letter-press copies of originals of letters, because proper notice to produce the originals had not been given where, when called upon to produce the originals, after objecting to the copies, the party holding them refused to do so, complaining that the notice was too short, it being reasonably inferable that the originals were then in court, or that they could have been readily produced. *Burton v. Frank A. Seifert Plastic Relief Co.*, 108 Va. 338, 61 S. E. 933.

(z-1) *Receiving in evidence carbon copy of contract was harmless.*

The reception in evidence of a carbon copy of a contract against objection, although erroneous, is harmless, where it appears on inspection that it is a faithful and accurate reproduction of the original. *Braun v. Hothan*, 84 N. Y. Supp. 8.

(a-2) *Permitting foreign documents to be translated in the hearing of the jury cured by their admission.*

Permitting documents in a foreign language to be translated in the hearing of the jury, before the court had decided upon their admissibility, if error, is one that is cured when the court afterwards admitted them in evidence. *Hutchins v. Kimmel*, 31 Mich. 126, 18 Am. Rep. 164.

CHAPTER VI.

CONDUCT OF COURT, COUNSEL, JURY AND PARTIES.

- Sec. 117. Accident or surprise.
- 118. Acquiescence.
- 119. Admissions.
- 120. Assumptions.
- 121. Attorneys-at-law.
- 122. Disclaimers.
- 123. Judicial discretion.
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- 125. Misconduct of counsel.
- 126. Misconduct of jury.
- 127. Misconduct of the parties.
- 128. Reading unconstitutional law to the jury.
- 129. Releases.
- 130. Tortfeasors.
- 131. Waivers.
- 132. Withdrawals.

Sec. 117. Accident or surprise.

- (a) *Where evidence disclosed nothing which could not have been anticipated, error can not be based on accident or surprise.*

Error can not be predicated upon accident or surprise, with reference to testimony offered by the opposite party, where a fair interpretation of the testimony of which complaint is made, discloses nothing which could not have been anticipated. *Houston v. Traction Co.*, 11 O. C. C. n. s. 365, 20 O. C. D. 790.

Sec. 118. Acquiescence.

- (a) *Acquiescence in incompetent but relevant evidence will sustain verdict based thereon.*

Where a party acquiesces in the admission of incompetent

but relevant evidence, a verdict based on it will not be disturbed. *Frauenthal v. Bridgeman*, 50 Ark. 348.

(b) *Judgment supported largely by hearsay evidence, acquiesced in, will be affirmed.*

Though the court might refuse to affirm a judgment based wholly on hearsay evidence, received without objection, if it be strongly fortified by other and good proof, and the acquiescence in its admission may have induced the non-production of direct evidence on the point, it will be considered. *Rountree v. Steamboat Co.*, 8 La. Ann. 289.

(c) *Erroneous measure of value acquiesced in by all parties.*

In an action for permanent injury to land, the testimony of witnesses as to the value of the land, if uninjured, and its value in its injured condition at the time of the trial, which was three years after the injury occurred; held, no objection having been interposed on that ground, and it not appearing that the value of the property might not have been the same, whether estimated as of the date of the injury or of the time of the trial, the admission of such evidence on the question of damages alone was not ground for disturbing the verdict on appeal. *Barnett v. St. Anthony Falls Water Power Co.*, 33 Minn. 265, 22 N. W. 535.

Sec. 119. Admissions.

(a) *Errors in evidence cured by defendant's admission.*

Where a cause of action is clearly established by the admissions of the defendant, errors in the admission of evidence and the giving or refusing of instructions are no ground for a reversal. *Schultz v. Babcock*, 166 Ill. 398, affm'g 64 Ill. App. 199; *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449.

- (b) *Admission that he made statement renders unnecessary further evidence thereon.*

When a witness has been asked, for the purpose of affecting his credit, whether he had made a certain statement, and he admitted it, it is not error to refuse to allow the same fact to be proved by another witness. *Threadgood v. Litogot*, 22 Mich. 271.

- (c) *Instruction that defendants admitted taking the goods.*

In an action against a sheriff and his deputies, a statement in the charge that defendants admitted taking the goods and converting a part of them to their own use, is not ground for reversal, though one defendant denied having anything to do with the taking, when it appears that all were concerned therein, and that the case was tried on the theory that if any of the defendants were liable all were. *Walker v. Collins* (Kan.), 50 F. 737, 8 C. C. A. 1, judg. rev. o. o. g. 167 U. S. 57.

- (d) *Error in instructing that plaintiffs admit certain facts in their pleadings was not prejudicial.*

Error in instructing the jury that plaintiffs admit certain facts in their pleading is not prejudicial, where all such facts are established by a preponderance of the evidence, and specially found to exist by the jury. *Caruthers v. Pemberton*, 1 Mont. 111, 116.

- (e) *Error in instructions cured by admission in pleadings.*

While it was error to instruct the jury that they must find for plaintiff if they believed the libelous writing was written or published by defendants, the error was not prejudicial, as the publication was virtually admitted by the pleadings. *Bannon v. Moran*, 12 Ky. L. R. (abst.) 989.

- (f) *Instruction to disregard admission of effort to compromise bastardy case cured error.*

In a prosecution for bastardy, while the relatrix was testifying the prosecuting attorney asked her what conversation she had with defendant, in May, 1882, about her pregnancy. When the question was asked, the defendant requested of the court the privilege of interrogating the witness as to whether the conversation occurred in an offer to compromise. The request was not then granted, and the witness, in answer to the question of the prosecuting attorney, stated that defendant, in that conversation, admitted that he was the father of the child. On cross-examination, she testified that the conversation between her and defendant did occur in an offer to compromise, whereupon the court directed the jury to disregard the conversation. Held, that the direction of the court cured any error of which defendant could complain in the admission of the evidence. *Houser v. State*, 93 Ind. 228, 230.

- (g) *Instruction enjoining caution in receiving parol proof of verbal admissions.*

An instruction that though parol proof of a verbal admission of a party, when it appears that the admissions were understandingly and deliberately made, often affords satisfactory evidence, the statements of witnesses as to verbal admissions of a party should be received with caution, is not prejudicial to a party to the suit against whom there was evidence of verbal admissions. *Baker v. Borello*, 136 Cal. 160, 68 P. 591.

- (h) *Receiving admissions made on former trial cured by other proof.*

The introduction in evidence of admissions of counsel made on a former trial, if error, is not prejudicial, where the facts to which they related were conclusively proved in-

dependently of the admissions. *Bank v. Strait*, 75 Minn. 396, 78 N. W. 101.

- (i) *Error in reading stricken testimony of witness is harmless where it contains only what is admitted by defendant.*

Where plaintiff, for the purpose of refreshing the memory of the witness, is permitted to read to him a portion of his testimony on a former trial, and to ask him if he so testified, but the witness does not answer, and the portion read is afterward stricken out, if error to permit the reading it is not reversible, when the testimony read contains nothing which defendant does not admit. *Dawson v. Schloss*, 93 Cal. 194, 29 P. 31.

- (j) *Admission against alleged partner was not harmful.*

In an action against an alleged partner, evidence of the admission of defendant made after the credit had been extended by plaintiff, while not admissible to lay the foundation upon which to build an equitable estoppel, was not harmful, where similar admissions were proved to have been made before the credit was extended. *Huysen v. Lawson*, 90 Mo. App. 82.

- (k) *Admission of a driver of a team at the time of an accident to prove his employment.*

Though the admission of the driver of a team at the time of an accident is, as a rule, not admissible to prove his employment, any error in admitting such declarations was harmless, as the presumption that he was driving for the owner followed as a matter of law. *Knust v. Bullock* (Wash. Sup.), 109 P. 329.

- (l) *Where admission in open court made it manifest the evidence offered was valueless its rejection was harmless.*

Where an admission in open court made it manifest that

evidence offered could not avail the party offering it, the error in rejecting it, being harmless, will not reverse the judgment. *Darnell v. State*, 27 Ind. 506.

(m) *Client not injured by oral admission of his counsel.*

The appellate court will not consider whether an oral admission by an attorney was brought, in view of Code of Civil Procedure, sec. 283, declaring that an attorney may only bind his client by a written agreement filed with the clerk, or entered on the minutes, where the admission was made by the attorney, objecting to it on appeal, and evidence corroborative of the admission was received without objection or exception, and showed the client not injured by the admission. *Quierolo v. Quierolo*, 129 Cal. 686, 62 P. 315.

(n) *Incompetent evidence to prove admitted facts not prejudicial.*

It is not prejudicial error to admit incompetent evidence to prove admitted facts. *McKindly v. Drew*, 71 Vt. 138, 41 A. 1039.

(o) *Improper evidence harmless, where the fact in question is admitted by the pleadings.*

The admission of improper evidence is harmless, where the fact sought to be shown thereby is admitted by the pleadings. *Bower v. Robinson*, 25 Ga. 144; *Helm v. Hardon*, 41 Ky. (2 B. Mon.) 231; *Haedey v. Coe*, 5 Gill (Md.) 189; *Colt v. Wapler*, 1 Minn. 134 (Gilm. 110); *Benton v. Nicoll*, 24 Minn. 221; *Teall v. Cin. Elect. Light Co.*, 119 N. Y. 654, 30 State Rep. 117, 2 Silv. 557; *Darling v. Peck*, 15 O. 65; *Cooper v. Blood*, 2 Wis. 62.

(p) *Overruling of demurrer to answer harmless, where agreed statement of facts admitted same to be true.*

Error in overruling a demurrer which questions the suffi-

ciency of an answer is harmless, where the agreed statement of facts contains an admission that the allegations of the answer are true. *State ex rel. Alford v. Bloouch*, 70 Ind. 204.

(q) *Striking out allegations cured by subsequent admission of fact.*

Where, in an action for personal injuries, the court struck from the answer allegations tending in mitigation of damages, such action was not prejudicial to defendant, where evidence as to such mitigating circumstances was admitted. *Beck v. Dowell*, 40 Mo. App. 71.

(r) *Overruling demurrer to answer where plaintiff's admissions defeat him.*

Where a demurrer to a paragraph of the answer is erroneously overruled, but the judgment is that which must be pronounced in the case, the plaintiff having admitted a fact which, under the issues must evidently defeat him, the error is harmless. *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. 370.

(s) *Permitting landlord's plea to be read as an admission that he caused the doors and windows to be taken out of the house.*

In an action by a tenant against his landlord for injuries caused by the landlord's removing the doors and windows from his residence, it was harmless, if erroneous, for the court to permit the landlord's plea, in which he stated that he had caused the doors and windows to be taken out of the house, to be read as an admission where that fact was proved by uncontroverted evidence. *W. B. Walker & Son v. Fisk* (Tex. Civ. App.), 136 S. W. 101.

Conduct of Court, Counsel, Jury and Parties. § 120

- (t) *In action against a city for death of a pedestrian, receiving admission of the mayor that he knew the sidewalk was dangerous.*

In a case against a city for the death of a pedestrian, error in admitting evidence of an admission made by the mayor, after the accident, that he knew the sidewalk was dangerous, was harmless, where the jury were instructed to disregard the evidence. *Laconte v. City of Kenosha*, 149 Wis. 343, 135 N. W. 843.

Sec. 120. Assumptions.

- (a) *Instructions ambiguous or misleading are condemned, but that the jury were misled must be shown, it will not be assumed.*

While instructions that are ambiguous or misleading in a way to permit the jury reasonably to entertain an erroneous and prejudiced view of the law of the case, will be condemned, it will not be assumed they might have been misled by a possible, but forced and unnatural interpretation of instructions. *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463.

- (b) *Error of court in assuming judicial notice of patent cured by the admission of the patent in evidence.*

Error of court in assuming judicial notice of patent and its bounds was cured by the admission of the patent in evidence. *United Land Ass'n v. Willows Land Ass'n*, 139 Cal. 370, 69 P. 1064, 72 P. 988.

- (c) *Instruction assuming to cover the whole case and directing verdict for personal injury.*

Where, in an action against a city for injuries in falling into a hole in the sidewalk, the evidence showed conclusively that plaintiff fell into a hole in the walk, which was made by surface water, and was of a size and depth sufficient to be

dangerous to travelers, especially on a dark, rainy night, as was that in question, and that it had existed for four months before the injury, error in an instruction, which assumed to cover the whole case and directed a verdict, for not requiring the jury to find that the hole made the sidewalk unsafe to pedestrians, and not instructing that the city was entitled to a reasonable time, after actual or constructive notice thereof, in which to repair the defect, was not prejudicial to the city; and hence, was not reversible. *Barnes v. City of St. Joseph*, 151 Mo. App. 523, 132 S. W. 318.

(d) *Instruction assuming that defendant was transporting plaintiff over its line, or that he was alighting from one of its cars, was harmless error.*

In an action against a street railroad company for personal injuries, in which plaintiff alleged that he got off defendant's car, and attempted to cross defendant's track, and was struck by another car while crossing, the giving of an instruction assuming that defendant was transporting plaintiff over its line, or that he was alighting from one of its cars, at the time of the injury, was harmless to defendant. *Burbridge v. R. Co.*, 36 Mo. App. 669.

(e) *Instruction assuming certain fact not prejudicial error where witnesses were unanimous on that point.*

Instruction assuming as a fact the occurrence of extraordinary floods in the past, can not be prejudicial error where the witnesses were unanimous on that point. *De Baker v. R. Co.*, 106 Cal. 257, 46 Am. St. Rep. 237, 39 P. 610.

(f) *Instruction which assumed that the place where plaintiff was struck by a taxicab was frequented at night by pedestrians.*

Instruction which assumed that the place where plaintiff was struck by a taxicab was frequented at night by pedes-

trians, a fact not proven, held harmless, where it clearly conveyed to the ordinary mind merely an idea that such care should be exercised in the management of a taxicab as to locality and time as proven would suggest as necessary to avoid accidents. *Heath v. Seattle Taxicab Co.* (Wash. Sup.), 131 P. 843.

(g) *Instruction assuming a fact in dispute.*

That an instruction give for defendant assumed a fact in dispute was not prejudicial to the latter, when it did not, in any event, warrant a verdict for plaintiff. *R. Co. v. Boyd* (Tex. Civ. App.), 141 S. W. 1076.

(h) *Instruction correct, but accompanied by assumptions as to facts in issue, will not reverse if jury not misled.*

If an instruction states a correct proposition of law it will not be reversed, even though it assumes facts, if the jury could not have been misled thereby. *Flechbein v. Strother*, 149 Ill. App. 356.

(i) *In action for failure to promptly forward funeral message, charge assuming that plaintiff suffered mental anguish.*

A charge, in an action for failure to promptly transmit a message apprising plaintiff's brother that she would be at the funeral of another brother, assuming that plaintiff suffered mental anguish is not prejudicial error, where the evidence conclusively shows that she, in fact, did so suffer, and the court further charged that she could not recover for grief arising from the death of her brother. *W. U. Tel. Co. v. Rabon* (Tex. Civ. App.), 127 S. W. 580.

(j) *Charge assuming that carrier was negligent not reversible error.*

Where, in an action for injuries to a passenger, the un-

disputed evidence established a prima facie case of negligence which was not rebutted by the carrier, so that the only just verdict was that the carrier was negligent, the error in a charge assuming the carrier's negligence was not reversible. *R. Co. v. Stone* (Tex. Civ. App.), 125 S. W. 587.

(k) *In action for failure to deliver a telegram, instruction assuming that the daughter was dying when telegram was presented.*

In an action for the negligent failure to deliver a telegram informing plaintiff of the serious illness of her daughter, any error in the court's charge, in assuming that the daughter was dying when the telegram was presented, was harmless, where she did, in fact, die a few hours thereafter, and defendant's negligence was properly submitted. *W. U. Tel. Co. v. Blair* (Tex. Civ. App.), 113 S. W. 164.

(l) *Erroneous assumption in instructions harmless where verdict manifestly right.*

Erroneous assumption of fact by judge in his instructions is harmless, where the verdict is manifestly right. *Graham v. Bradley*, 24 Tenn. (5 Humph.) 476.

(m) *Erroneous assumption by judge of name of particular firm harmless where question was whether defendant was a member thereof.*

An erroneous assumption by a judge in his charge to the jury of the existence of a firm by a particular name is harmless error, where the material question was not, what was the real name of the firm, but whether defendant was a member thereof. *Converse v. Meyer*, 14 Neb. 190, 15 N. W. 340.

(n) *Court assuming an admitted allegation to be true.*

Where an allegation of the plaintiff is admitted by the answer, it is not necessary for plaintiff to prove it, and there-

fore the remarks of the court, in the presence of the jury, which assumed the allegation to be true, is harmless. *Fitzgerald v. School Dist. No. 20*, 5 Wash. 112, 31 P. 427.

(o) *Court assuming existence of facts which should have been left to the jury.*

What is reasonable diligence of the collection of a note, when there is a guaranty of the solvency of the drawer, is a question of law for the court to decide, and a delay from the 25th of December of one year until the first term of the court in March of the next year is not reasonable diligence. Where the facts upon which the question of reasonable diligence turns are plainly shown by the date of the maturity of the note sued on, and by the record of the suit which was brought against the makers, and the jury could not then, nor upon a retrial, find otherwise than they did, the justice of the case having been attained, the court will not reverse the judgment merely because the judge assumed the existence of these facts which strictly he should have left to the jury to find, there being no error in the statement of the law. *Graham v. Bradley*, 24 Tenn. (5 Humphreys) 476.

(p) *Instruction assuming that person to whom plaintiff complained of defect had authority to order car turned in.*

Where, in an action for injuries to a motorman by reason of an alleged defect in the brake of his car, it was not contradicted that the person to whom plaintiff complained of the brake, prior to the accident, had authority to order the car turned in and another car brought out in its place, error of the court in assuming, in the instruction, that the person to whom plaintiff complained of the defect had such authority, was harmless. *Cole v. St. Louis Transit Co.*, 183 Mo. 81, 81 S. W. 1138.

(q) *Instruction assuming that contract was made when possession was taken.*

In an action to recover balance due for threshing wheat, an instruction that the jury were to find for the plaintiff if defendant contracted to pay for the threshing "on taking possession of the wheat," was not prejudicial to defendant in assuming that the contract was made when possession was taken, when, in fact, it was made on the next day. Hill Bros. v. Bank, 100 Mo. App. 230, 73 S. W. 307.

(r) *Instruction erroneously assuming that a certain manufacturer made the steel in question.*

In an action to recover the reasonable value of a boiler furnished, the petition averred that the boiler was made of Park Bros. best flange steel, but there was no evidence of that fact. Plaintiff's proof, however, was clear and entirely undisputed, that the boiler furnished by it was constructed of the best flanged steel, and that the steel was specially made for high grade boiler work. It also appeared by the evidence that the same kind of steel is manufactured by several firms, and that this grade of steel was of substantially the same quality and value. Held, that while the instruction was erroneous in assuming that there was evidence tending to show that the steel was made by Park Bros. the error did not materially affect defendant's case. N. O. Nelson Mfg. Co. v. Mitchell, 38 Mo. App. 321.

(s) *Instruction erroneously assuming fraud in the case.*

Where an instruction authorized the jury to find for the defendant, if they believed from the evidence that when the insured applied for insurance, he falsely and fraudulently answered the questions, was erroneous, because there was no fraud alleged in defendant's answer, it was favorable to the defendant company, and defendant can not complain that it was in conflict with the defendant's instructions which

properly stated the law. *Summers v. Insurance Co.*, 90 Mo. App. 691.

(t) *Instruction assuming an unproved fact, sustained by the evidence in the case.*

Defendant can not complain of an instruction telling the jury that, if they find for plaintiff, his measure of damages was, "a fair and reasonable equivalent in money for the pain and suffering of body and mind sustained by the plaintiff as the direct result of said injury," as the instruction, even if it assumes that plaintiff did sustain injuries and suffering of body and mind, was not prejudicial, in view of the undisputed evidence that plaintiff's injuries were very painful. *Reliance T. & D. Works v. Martin*, 23 Ky. L. R. 1625, 65 S. W. 809.

(u) *Error in assuming in an instruction that person injured was in the employ of defendant cured when such was the fact.*

Error in assuming in an instruction that a person injured was in the employment of defendant at the time of the injury, is not ground for the reversal of a judgment for plaintiff, where it appears from the answers of the jury to interrogatories that the person injured was in such employment at such time. *R. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 285.

(v) *Erroneous assumption in a charge cured by subsequent instruction that it is for the jury to decide whether such fact exists.*

Error in assuming the existence of a particular fact in a charge to the jury is cured by a subsequent instruction that it is for them to decide whether such fact exists. *Wash. Gas Light Co. v. Poore*, 3 App. (D. C.) 127.

- (w) *Harmless inadvertent assumption by court in instruction.*

Where an action for injuries to a railroad employee was brought under Burns's Annotated Statutes 1901, sec. 7083, subd. 4, authorizing an action for such injuries caused by the negligence of the employee in charge of the work, or by a fellow-servant, etc., and the jury found for plaintiff thereon, the inadvertence of the court in assuming, in its instructions, that the paragraph of the complaint attempting to constitute a cause of action on defendant's common law liability to furnish plaintiff a safe place to work, to which a demurrer had been sustained, was still in the record, was harmless. *R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589.

- (x) *The court assuming a fact, not error if there is no evidence to warrant the jury in finding the contrary.*

When the court instructed on a matter, and takes for granted therein something that should be left to the jury, still it will not be error, if there is no evidence at all to justify the jury in finding contrary to the assumption of the court. *Walling v. Warren*, 2 Col. 434.

- (y) *Fact assumed by the court indisputably established or conceded, however technically erroneous under the issues.*

Where, at the trial, the existence of a fact controverted by the pleadings is practically conceded or established by clear and undisputed evidence, its existence may be assumed in the charge of the court, without prejudice to the substantial rights of the parties, and such charge, though technically erroneous under the issues, will not be regarded as error requiring a reversal of the judgment. *Weil v. Nevitt*, 18 Col. 10, 31 P. 487.

(z) *Instruction assuming uncontroverted facts was harmless.*

Error in an instruction in assuming uncontroverted facts is harmless. *R. Co. v. Hudson* (Ark. Sup.), 130 S. W. 534; *Henderson v. Tenine*, 8 Ind. App. 416, 35 N. E. 1046; *Auchinloss v. Frank*, 17 Mo. App. 41.

(a-1) *On exception to finding as contrary to law, and all the evidence is taken up, but no finding of facts, appellate court assumes that court below found all necessary facts to sustain its judgment.*

On exception to a finding as contrary to law, and all the evidence is taken up, but no finding of facts, this court must assume that the court below found all the necessary facts, and counter evidence will not be considered, for non constat, the court below believed it. *Fortman v. Goepper*, 14 O. S. 550.

(b-1) *Proof of value of property on assumption that elevated railroad was built.*

In an abutter's action for injunction against an elevated railroad, allowance of proof by expert witnesses as to the value of plaintiff's property, upon the assumption that the elevated railroad was built; held, not ground for reversal, as defendants were not prejudiced, since the trial judge was not misled by the testimony as appeared from his statement that he received it "as one of the factors in the ascertainment of damages, reserving the question as to its application." *Mitchell v. R. Co.*, 31 State Rep. 80, 9 N. Y. Supp. 130, aff'd, 132 N. Y. 552, 43 N. Y. St. Rep. 476, dist'g *McGean v. R. Co.*, 117 N. Y. 219, 27 State Rep. 337.

(c-1) *Instruction that defendant assumed the burden of proof of rescinding his purchase.*

In an action to recover the agreed price of goods sold and

delivered the defendant assumed the burden of proving the right to rescind his purchase to the extent of the goods returned. Held, that an instruction that defendant had the burden of such proof was harmless. *Keller v. Strauss*, 35 Misc. 35, 104 State Rep. 126, 70 N. Y. Supp. 126.

Sec. 121. Attorneys at law.

- (a) *Judge acting as attorney in a case after his appointment on the bench.*

If the precipe for default was filed by plaintiff's attorney after his appointment and qualification as circuit judge, such action was purely ministerial, and, even if improper, would not, of itself work a reversal of the judgment which was entered later upon the precipe of other attorneys. *Cone, Adm'r, v. Knight*, 52 Fla. 247.

- (b) *Allowing plaintiff (an attorney) to assist the attorney of record.*

It was not reversible error to permit plaintiff, who was an attorney, to appear with his attorney of record and assist in the trial of the case. *Conroy v. Waters*, 133 Cal. 211, 65 P. 387.

- (c) *Where memoranda were inadvertently placed on the back of an instruction by an attorney, the verdict would not be set aside.*

A verdict should not be set aside because certain memoranda, inadvertently placed on the back of an instruction by an attorney, where most of the memoranda were meaningless, and none of them calculated to have any effect upon the jury. *Bassell v. R. Co.*, 125 Mo. App. 441, 102 S. W. 613.

- (d) *Reversible error can not be predicated on the words of an attorney in argument, where promptly withdrawn, and amount of verdict does not show that jury were influenced thereby.*

Reversible error can not be predicated on the words of an attorney in argument, where they were promptly withdrawn by him, and the amount of the verdict does not show reasonably that the jury could have been influenced or impassioned thereby. *R. Co. v. Geraldon* (Tex. Civ. App.), 117 S. W. 1004.

- (e) *In action by attorney to recover fee, error in denominating his action a cross-petition.*

Where, after a settlement of litigation between the parties, without the knowledge of plaintiff's attorney, he petitioned, before the action was dismissed, for a recovery of his fee from defendant, under Kentucky Statutes 1903, sec. 107, giving attorneys a lien on all claims placed in their hands for the amount of the fee agreed on, or a reasonable fee, the error in denominating the attorney's petition a cross-petition, because under sec. 96c, Code of Civil Procedure, a cross-petition is one allowed to one who is a party, was not prejudicial. *Proctor Coal Co. v. Tye & Denham*, 29 Ky. L. R. 804, 96 S. W. 512.

- (f) *Court instructing jury in the absence of counsel.*

While it is improper for the court to instruct the jury, in the absence of a party's counsel, thereby depriving him of the opportunity to except or to ask for qualification of the instruction, yet where it can clearly be seen that no injury was done to the party by the instructions given in a case of such slight departure, no reversal can be had. *Wade v. Ordway*, 48 Tenn. (1 Baxter) 229.

(g) *Error in charge as to agent cured by finding act done by attorney.*

An instruction that if A was attorney for plaintiffs, and acting for them in the execution of a mortgage to them, his knowledge of alterations therein was knowledge of the plaintiffs, if erroneous, as charging plaintiffs with after acquired knowledge of their agent, was harmless, in view of a finding that the alteration was made by A, while acting as plaintiffs' attorney. Cahell v. McKinney, 31 Ind. App. 548, 68 N. E. 601.

(h) *Admission of evidence of attorney without qualifying as expert.*

In an action on a note, secured by a mortgage on fixtures and stock, a maker having turned over the security to the holder to apply the proceeds on the note, where the attorney for the latter, without qualifying as an expert, testified as to the value of the stock, and that it was some time before a buyer could be found at any price, and it was otherwise shown that no one could be induced to buy at a greater price, the error in the admission of the attorney's evidence is not reversible. Milbank-Scampton Milling Co. v. Packwood, 154 Mo. App. 204, 133 S. W. 667.

(i) *Permitting relator to testify to amount paid attorneys.*

The error of the court in permitting relator to an action on an attachment bond to testify to the amount paid by him to his attorneys was harmless, where the court declared that he could not allow the relator anything on account of such attorney's fees. State ex rel. Cole v. Shofe, 23 Mo. App. 474.

(j) *Plaintiff's attorney attempting to get inadmissible evidence to jury does not call for a reversal of the judgment.*

The counsel for plaintiff in a negligence case, on cross-

examination of defendant's claim agent, inquired concerning the possession of a letter written to him by the plaintiff's son-in-law about the time of the accident, on objection by the defendant, plaintiff's attorney stated, that it was a description of the details of the accident, and that plaintiff had a reply to the letter. The court excluded the letter, and instructed the jury to disregard the statement of plaintiff's attorney. Held, that the action of plaintiff's counsel in thus attempting to get before the jury inadmissible evidence did not call for reversal of the judgment for plaintiff, the verdict not being excessive, and there being no weight of evidence in favor of defendant's theory, as to the cause of the accident. *Connolly v. R. Co.*, 86 App. Div. 245, 117 St. Rep. 833, 83 N. Y. Supp. 833, rev. o. o. g. 179 N. Y. 7.

(k) *Permitting plaintiff to testify as to the advice of his counsel under a policy of insurance.*

In an action for deceit in the sale of a policy of insurance, wherein plaintiff might be entitled to recover back the premiums he had paid, it was proper for him to show when he first learned that he had been deceived, and, although not showing this, he was permitted to state what his counsel informed him as to the legal effect of the policy, the defendant was not prejudiced thereby, for the information was nothing more than what defendant upon trial conceded to be the legal effect of the instrument. *McKindly v. Drew*, 71 Vt. 138, 41 A. 1039.

(l) *Incompetent testimony of defendant's counsel was not prejudicial.*

On a motion to amend a record so as to show that no judgment was rendered against plaintiffs as regarded the admission of incompetent testimony of defendant's counsel, that it was agreed that a final judgment should be rendered to follow the disposition of a demurrer, was not prejudicial,

as the record was not impeachable, and the only effect of the attorney's testimony was to sustain the record. *Henley v. Kinley*, 16 Mo. App. 176.

(m) *Taxing attorneys' fees separately, instead of as part of the costs, a mere informality.*

Where attorneys' fees are taxed separately in a judgment, instead of as a part of the costs, as provided, such error is a mere informality for which the judgment should not be reversed. *State ex rel. Bauer v. Edwards*, 144 Mo. 467, 46 S. W. 160.

Sec. 122. Disclaimers.

(a) *Erroneous evidence cured by plaintiff's disclaimer and the court's instructions.*

In an action for personal injuries by an administrator, under the survival act (Compiled Laws 1897, sec. 10117), the error in admitting evidence that decedent left a family is harmless, where plaintiff disclaimed any recovery on such evidence, and the court so instructed the jury. *Oliver v. R. Co.*, 138 Mich. 242.

(b) *Disclaimer by one jointly interested cured alleged defect of parties plaintiff.*

Although one who was jointly interested with plaintiff was, as a matter of law, a necessary party to the action; yet, where he came into court and announced in his testimony that he had no claim against the defendant on account of the loss of the logs, and had no interest in the action, the fact that he was not a party is not ground for reversal, the jury being instructed that plaintiff was entitled to recover only the value of his interest. *Ky. Lumber Co. v. Sears*, 13 Ky. L. R. (abst.) 926.

Sec. 123. Judicial discretion.

- (a) *Abuse of judicial discretion not reversible on appeal for granting or refusing a continuance.*

Judgments of the lower court will be affirmed on appeal where the point relied upon involves the discretion of the trial judge, unless it appear from the face of the record that the discretion has been grossly abused to the injury of defendant. The granting or refusing of a motion for continuance is addressed to the sound discretion of the trial judge, and, as a rule, is not reversible on appeal. *Thomas v. McCormick*, 1 N. M. 369.

- (b) *The record must show the abuse of judicial discretion.*

A court will not pass upon a discretionary ruling where the record does not show that the exercise of the discretion was improper. *R. Co. v. Shank*, 30 Ill. App. 586.

- (c) *Court permitting to be read to jury subpoena for a witness and the return thereon was harmless.*

The supreme court will not reverse because the circuit judge permitted the successful party to read to the jury a subpoena for a witness and the return thereon, part of the record in the case, but no evidence of any fact which could, by any possibility, have affected the verdict. *Miller v. Koger*, 28 Tenn. (9 Humphreys) 231.

- (d) *Judge continuing to sit in case after being a witness not shown to have affected the result.*

While an abuse of discretion on the part of a judge in continuing to sit in a case after he had been called as a witness would be cause for reversal, it is not necessary to determine whether the judge who presided in this case abused that discretion, as his testimony could not have affected the result, he having testified only as to the value of the services for which plaintiff (appellee) sued to recover,

which was a point upon which defendant (appellant), introduced no testimony, seeming to abandon that branch of his defense, and to rely solely upon the alleged fact that the payment, admitted by plaintiff, had been accepted by him in full satisfaction of his claim. *Bourne v. Major*, 13 Ky. L. R. (abst.) 544.

(e) *Permitting counsel to ask defendant if he had ever before been on the witness stand.*

Counsel for plaintiff asked defendant if he had ever been on the witness stand before, and, upon the objection to the question being overruled, offered to show that he had been a witness about a hundred times. The court refused to tell the jury that the statement was irregular. He then asked him if he had about ten cases in the supreme court of the state. This question was overruled. Held, that the questions and offers to prove were improper, but did not so prejudice the rights of defendant as to warrant a reversal. *Brennan v. Busch*, 67 Mich. 670, 35 N. W. 795.

(f) *Allowing immaterial leading questions.*

In an action to recover money paid on a note given by plaintiffs at defendant's request to a third person, to take the place of and release defendant's mortgage to such person, allowing a leading question to plaintiff, to the effect that the house on which the mortgage existed was the individual property of defendant was harmless error, as the inquiry was immaterial. *Tredway v. Antisdell*, 86 Mich. 82, 48 N. W. 956; *Emlam v. Insurance Co.*, 108 Mich. 554, 66 N. W. 469.

(g) *Court permitting indelicate question to a woman.*

A woman appearing as complaining witness in a case of alleged indecent assault, was required to state that she had been undergoing treatment at the medical college. Held,

that error in permitting her to be asked whether she was treated in the presence of the class was not reversible error, in view of the probable sympathy of the jury, and the probability of their resenting the insult to her. *Derwin v. Parsons*, 52 Mich. 425, 18 N. W. 200, 50 Am. Rep. 262.

(h) *Cross-examination as to what witness had testified in a certain deposition.*

It is not prejudicial error to permit a witness to be cross-examined as to what she had testified to in a certain deposition, without first submitting the deposition to her, where nothing prejudicial was elicited on such cross-examination, and the deposition was thereafter put in evidence and counsel given an opportunity to comment on it. *Vosburg v. Brown*, 119 Mich. 697, 78 N. W. 886, 6 D. L. N. 40.

(i) *Restricting cross-examination of surety.*

Where a surety defends on the ground that he signed on condition that another surety be obtained, which was not done, the restriction of his cross-examination by excluding evidence of his statements that he understood that one who did sign with him was a principal, is not ground for reversal. *People, to use of Nat. Sewer Co. v. Sharp*, 133 Mich. 378, 94 N. W. 1074, 10 D. L. N. 217.

(j) *Allowing physician to testify that others were reputable physicians.*

Where, in a personal injury action, the issue was whether plaintiff's leg was broken, and the jury showed, by their verdict that they found his leg was not broken, the error in allowing a physician to testify that the physicians attending plaintiff and who testified that his leg was broken were reputable physicians, was not prejudicial. *Weitzel v. Village of Fowler*, 143 Mich. 700, 107 N. W. 451, 13 D. L. N. 90.

- (k) *Permitting witness to testify that it was the duty of the superintendent to keep gate in repair was not prejudicial error.*

In an action for the death of a servant by the fall of a heavy gate, which was out of repair, in which defendant claimed that it was intestate's duty to inspect and repair the gate, and therefore he could not recover, it was not prejudicial error for the court to permit a witness to testify as to whether it was the duty of defendant's superintendent to keep the gate in repair. *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297, 96 N. W. 569, 10 D. L. N. 454.

- (l) *Refusal to permit plaintiff to answer question in an action to terminate the marriage contract.*

Plaintiff and defendant, who had entered into a contract of marriage, decided to terminate it, and defendant agreed, in writing, in consideration of the return of a watch given by him to the plaintiff, to transfer all his interest in certain other presents, return all of plaintiff's letters, and not to speak to her, without her consent, and in case of a breach of any of the conditions, to return the watch. In an action for the return of the watch for breach of the conditions, defendant claimed that plaintiff orally agreed to turn over certain things to defendant's sister, and had failed to do so. Held, that defendant was not prejudiced by the refusal to permit plaintiff to answer a question as to whether or not she had disposed of such things, the jury having found that defendant did not sign the agreement on plaintiff's promise to return them to his sister. *Richmond v. Nye*, 126 Mich. 602, 85 N. W. 1120, 8 D. L. N. 141.

- (m) *Refusal to permit defendant on cross-examination to show plaintiff's incapacity to translate ritual.*

Where, in an action to recover instalment due on a con-

tract for the sale of rights in a secret society, defendant contended that plaintiff had broken the contract by reason of his failure to make a translation of the ritual, and plaintiff claimed that the same had not been made because of defendant's failure to furnish him with the ritual for translation, and the jury rendered a verdict for plaintiff, the fact that the court refused to permit defendant to show plaintiff's incapacity to make the translation, on cross-examination, was harmless, since the jury must have found that defendant had not given plaintiff an opportunity to make the translation. *Burt v. Greene*, 125 Mich. 328, 84 N. W. 317, 7 D. L. N. 545.

(n) *Refusal to strike out improper statement of counsel as a witness.*

Where plaintiff claimed that a conveyance by defendant of his stock of goods had been in fraud of creditors, and one of the attorneys for the purchaser of the stock was called as a witness to rebut statements made by a witness, that the attorney had told him, in effect, that the transaction was fraudulent, and the attorney stated that he knew, as a fact, that the purchaser was innocent of any intention to wrong anyone, failure of the court to strike out the statement, as argumentative, was harmless error, it appearing that the attorney was subsequently examined in chief and cross-examined as to every fact connected with the transaction from its incipiency. *John Deere Plow Co. v. Sullivan*, 158 Mo. 440, 59 S. W. 1005.

(o) *Refusal to allow questions where responsive answers would not have established defense.*

Refusal to allow witnesses for defendant to answer certain questions is not cause for reversal, where responsive answers would not have established the defense. *State, ex rel. Farwell v. Leland*, 82 Mo. 260.

- (p) *Refusal of offer to prove written consent, in action to recover money paid to make verbal contract binding.*

In an action by two plaintiffs to recover money paid defendant to make binding a verbal contract for the sale and purchase of a hotel lease and furniture, error, if any, in refusing to permit one of the plaintiffs to state for what purpose he had procured in his name a written consent of the lessors to transfer the hotel lease to him, was harmless. *Wallich v. Morgan*, 39 Mo. App. 469.

- (q) *Refusal to permit proof of cost of feed and care of hogs.*

Where, in replevin for hogs, the alleged sale of the hogs by the judgment debtor was denied, and it was claimed that such sale, if made, was fraudulent as to the debtor's creditors, and the jury returned a verdict for defendant, plaintiff was not prejudiced by the refusal of the court to permit him to prove the cost of feeding and caring for hogs while they were in his possession under the writ. *Finnell v. Million*, 99 Mo. App. 552, 74 S. W. 419.

- (r) *Refusal to permit counsel to inspect memorandum used by witness.*

Refusing to permit counsel to inspect, for the purpose of cross-examination, a memorandum used by a witness to refresh his memory during his direct examination, is not ground for reversal where, on the finding of the court on the question involved, it is clear that no cross-examination could have affected the result. *Bank v. Bank* (Kan.), 61 F. 809, 10 C. C. A. 87; *R. Co. v. Mortenson*, 63 F. 530, 11 C. C. A. 335, writ of error dis. 17 Sup. Ct. 997, 41 L. Ed. 1179.

- (s) *Allowing jury to remain in room during argument for a directed verdict.*

Where the jury were permitted to remain in the room

while decisions were read to the court in argument upon a motion for a directed verdict, the plaintiff's counsel expressly stated to the jury that such decisions were not to be considered by them, but that they were to obtain their facts from the evidence and their law from the charge of the court, and these instructions were later repeated by the court, the error in allowing the jury to remain did not injure defendants. *Rice v. Dewberry* (Tex. Civ. App.), 93 S. W. 715. During argument of question of law, *Gilcher v. Seattle Electric Co.* (Wash. Sup.), 144 P. 530.

(t) *Court permitting the statute of another state, wherein the injury was received, to be read to the jury.*

Though, in a personal injury action, the court might properly have forbidden the reading of a statute of another state wherein the injury was received, and expressed the law entirely in instructions, the judgment will not be reversed because the court permitted the statute to be read. *R. Co. v. Isom* (Miss. Sup.), 45 S. 424.

(u) *In action for failure to deliver staves, refusal to permit counsel for seller to argue that a dead-cull would be a valueless stave.*

In an action against the seller for failure to deliver staves, refusal to permit counsel for the seller to argue that, under the evidence, a dead-cull would be a stave of no commercial value, was not prejudicial. *L. N. Lanier & Co. v. Little Rock Cooperage Co.*, 88 Ark. 557, 115 S. W. 401.

(v) *Court, in the absence of counsel, sending contract to jury.*

It was not prejudicial error on a trial to recover for injuries to mules in transit, for the court, on its own motion and in the absence of plaintiff and his attorneys, to send to the jury, after its retirement, the live-stock contract sued on. *Fibus v. R. Co.* (Court App., Ind. Ter.), 104 S. W. 568.

- (x) *Court, in the absence of plaintiff or his attorney, recalling the jury and urging that an agreement be reached.*

Where the court recalled the jury and urged an agreement, in the absence of plaintiff or his attorney, and afterwards recalled the jury again and urged their agreement still more strongly, using the language to which plaintiff principally objected in that connection, the absence of the attorney on the prior occasion could not have resulted in material prejudice. *Karner v. R. Co.*, 82 Kan. 842, 109 P. 676.

- (y) *Court bringing jury together, after they separated, to reconsider and correct the verdict rendered.*

However erroneous the action of the court may be in permitting the jury to reconsider and correct a verdict rendered, after they have separated, the court will not reverse unless there are some merits in the case. *Wickizer-McClure Co. v. Birmingham & S. Co.*, 151 Ill. App. 540.

- (z) *Permitting jury to separate, after being instructed and before entering upon their deliberations.*

In the absence of prejudice, the action of the trial court in permitting the jury, after being instructed, to separate before entering upon their deliberations, will not reverse. *Yenne v. Centralia Coal Co.*, 165 Ill. App. 603.

- (a-1) *Ordinarily, not abuse of discretion to refuse amendment to correct variance between facts as proven and as alleged.*

Where there is a variance between the facts as proven and as alleged the better practice is to grant leave to file an amended petition, but when the court refuses this, and there is no abuse of discretion, the judgment below will not be reversed on error. *Fisher v. Villwock*, 14 O. C. C. 389, 6 O. C. D. 373, 20 D. (Ohio) n. p. 701, aff. w. o. 56 O. S. 751.

(b-1) *Refusal to re-direct jury to return definite answers to interrogatories.*

If the jury return evasions or equivocal answers to some of the special interrogatories proposed, and a motion is made to the court to remand the jury and require them to return definite answers to such interrogatories, and the motion is refused, but the party to the cause making such motion is not damaged by such evasions or equivocal answers, the refusal of the court to remand and direct the jury is not reversible error. *R. Co. v. Johnson*, 3 Okla. 41, 41 P. 641.

(c-1) *Requires strong abuse of discretion to reverse setting aside of a denial to grant a new trial.*

Where there are successive verdicts for the same party, and the lower court refuses to set aside the verdict because of the insufficiency of the evidence, it requires a strong case of abuse of judgment on the part of the jury to justify a reversal on appeal. *Slocum v. Knosby*, 80 Iowa 368; or for change of venue, *Purcell Wholesale Grocery Co. v. Bryant*, 6 Ind. Ter. 78, 89 S. W. 662.

(d-1) *Court interrupting plaintiff's counsel during his argument.*

The trial judge's interruption of plaintiff's counsel during his argument was not reversible error, where not prejudicial. *International Mercantile and Bond Co. v. Shaw-Wells Co.*, 67 Wash. 369, 121 P. 834.

(e-1) *Misconduct of trial judge must affect substantial rights to be material.*

The misconduct of the trial judge only includes departures from the due and ordinary method of the disposition of an action by which the substantial rights of a party are materially affected. *Koger v. Willmon*, 12 Cal. App. 87, 106 P. 599.

(f-1) *Permitting an unsworn deputy sheriff to sign a requisition for the return of property.*

The erroneous granting of permission by the trial judge to an unsworn deputy sheriff to sign a requisition for the return of property to the plaintiff is harmless, for plaintiff was entitled to the goods without such requisition. *Butts v. Screws*, 95 N. C. 215.

(g-1) *Insufficiency of affidavit to disqualify a judge to preside.*

Where the regular judge vacated the bench, upon the filing of an affidavit that he would not afford the plaintiff a fair trial, defendant can not complain that the affidavit was not sufficient to show his disqualification, as a judge may decline to sit in any case in which he deems it improper to preside. *R. Co. v. Shuck*, 23 Ky. L. R. 25, 62 S. W. 259.

(h-1) *Not an abuse of discretion to permit plaintiff to withdraw his announcement of readiness for trial.*

Is it not an abuse of discretion for the court to permit plaintiff, after the trial is entered upon and part of his evidence given to the jury, to withdraw his announcement of ready, because of a variance between the description of a trust deed in his pleadings and the instrument itself as offered in proof. *Sanger v. Henderson*, 1 Tex. Civ. App. 412. Or to refuse permission to withdraw, *Miller v. Morris*, 55 Tex. 412.

(i-1) *Hearing testimony of witnesses after arguments to jury.*

The discretion of the court in trying a replevin suit, in admitting evidence of the demand and refusal, after the defendant's testimony was in and the arguments concluded, is not reversible, no injury to his cause being shown. *Crawford v. Furlong*, 21 Kan. 698.

- (j-1) *Permitting counsel to argue that it was negligence for defendant to use wood instead of coal.*

In an action against a railroad company for damages from a fire alleged to have been caused by a locomotive, it was not prejudicial error to permit counsel to argue that it was negligence for defendant to use wood instead of coal where, under the instructions, the jury were required to base their verdict for plaintiff on negligence in the use of insufficient appliances. *R. Co. v. Phillips*, 80 Ark. 292, 96 S. W. 1060.

Sec. 124. Judicial remarks.

- (a) *On absence of former counsel for defense court remarked that defendant could procure other counsel, which defendant did.*

A remark of the judge, in denying a motion for a continuance on the ground of the absence of defendant's former counsel, that if defendant had any defense he would have no difficulty in procuring other counsel, where defendant did procure other counsel of good standing. *Fitzgerald v. Conners* (Vt. Sup.), 92 A. 456.

- (b) *Court's criticism of defendant's pleading before the jury.*

Criticisms by the court, in the presence of the jury, upon defendant's pleading, where amendment is allowed such criticisms do not constitute prejudicial error. *Suhr v. Hoover*, 15 O. C. C. 690, 8 O. C. D. 738.

- (c) *Something more than intemperate language of the court in charging the jury is necessary to reverse a case.*

A judgment will not be reversed because the court, in its charge to the jury, uses language that is intemperate and seems to evince feeling in the matter, where there is no objection that the instruction complained of is erroneous,

as a matter of law, and a verdict and judgment against the defendant is the only one that could have been rendered according to the law and the evidence in the case. *Hayes v. Todd*, 34 Fla. 233, Marry, J., dissenting.

(d) *Answer of the court to inquiry of juror not cause for reversal.*

During the charge of the court, in an action by an agent to recover a balance due on salary, one of the jurors asked if there was any evidence to show that plaintiff had received as application fees more than he had accounted for. To this the court replied, "That is a question for you to settle; plaintiff says he took none of them except the \$61." Held that, as the defendant did not call the attention of the court to any evidence to the contrary, and there was no testimony on the subject except as the court stated, the remark was not cause for reversal. *Lee v. Huron Indemnity Union*, 135 Mich. 291, 97 N. W. 709, 10 D. L. N. 740.

(e) *Remarks of judge tending to constrain jury to agree upon a verdict not reviewable in court of appeals.*

Remarks of the judge which, though calculated to constrain the jury to agree upon a verdict, did not contain any erroneous rule of law; held, not reviewable by the court of appeals. *Connors v. Welsh*, 131 N. Y. 590, 42 St. Rep. 868, dist'g *Cranston v. R. Co.*, 103 N. Y. 614, 4 State Rep. 300.

(f) *Remark by the court that it was "nothing of any consequence that thousands had passed the place without injury."*

In an action against a town for personal injuries received by being swept off a load of hay by the branches of a tree overhanging the highway, upon the question of notice to defendant, the court having charged that it was "nothing of any consequence that thousands had passed the place without injury," at the close of the charge stated, that that fact

might be taken into consideration. Held, that the former statement did not, in view of the later one, afford sufficient ground for reversal. *Embler v. Town of Wallkill*, 43 St. Rep. 631, affm'g 57 Hun 384, 32 St. Rep. 700, 10 N. Y. Supp. 797.

(g) *Court making statements to the jury in the absence of counsel.*

Notwithstanding the general rule that there ought to be no communication between the judge and the jury, after the cause has been submitted to them; held, it is not ground for a new trial, that after the jury had retired and deliberated for a time, the judge made certain statements to them in open court, in the absence of counsel, whose attendance it was impracticable to secure. *Wiggins v. Downer*, 67 How. Pr. (N. Y.) 65.

(h) *Court reprimanding the jury.*

While it is irregular and improper for the court to induce action of the jury by reprimand, yet it does not constitute reversible error, when the action induced was clearly legal, and such as the court himself would have performed without the aid of the jury. *Knights of Pythias v. Allen*, 104 Tenn. 623, 58 S. W. 241.

(i) *Erroneous statement by court cured by subsequent correct instruction.*

A statement of the judge during the trial that was calculated to mislead the jury to the prejudice of the appellant was held to be cured by a subsequent instruction correctly stating the law. *Van Lehn v. Morse*, 16 Wash. 219, 47 P. 435.

(j) *Remark of court harmless when verdict clearly right.*

The fact that the court answered a question asked by the jury during their deliberations, without informing counsel

until after the verdict, will not vitiate a verdict which correctly decides the case. *Buntin v. City of Danville* (Va.), 93 Va. 200, 24 S. E. 830.

(k) *Remark by court to counsel that he was injecting a false issue into the case was cured by confining the jury to the issues.*

Error, if any, in the court's stating to plaintiff's counsel during the trial that he was injecting a false issue into the case, was cured by the statement in the court's charge, that perhaps he ought not to have made such remark, and then followed, stating the issues as claimed by both parties. *Sebeck v. Plattdeutsche Volksfest Verein* (N. Y.), 124 F. 11, 59 C. C. A. 531, writ of error den. 194 U. S. 634.

(m) *Improper remarks by judge to the foreman of the jury.*

After the jury had retired the foreman returned to get some papers, when the judge remarked to him, "Mr. Foreman, the contract must be with reference to her separate estate or concerning it. I used the word 'benefit' in my charge, and I now withdraw it." The judge had used language in his charge which might imply that the contract must be for the "benefit" of her estate, but, his attention being called to it at the time by the attorney, he expressly charged that it was not necessary, but that the contract must have reference to her estate. Held, that though the remarks to the foreman were improper, the error was harmless, as they neither added to nor qualified the instructions given to the jury. *McCord v. Blackwell*, 31 S. C. 125, 9 S. E. 777; *Taylor v. Dominick*, 36 S. C. 368, 15 S. E. 591. Also, communicating with the foreman of the jury in a whisper, *Chinn v. Davis*, 21 Mo. App. 363.

(n) *Remarks of trial judge calculated to intimidate the jury.*

Where it is apparent to an appellate court, from the entire

record and proofs, that the jury could not properly have found otherwise than in favor of the plaintiffs, as they did find, it will not reverse the judgment because of improper remarks by the trial judge calculated to intimidate the jury, but will treat such remarks as harmless error. *Hoey v. Fletcher*, 39 Fla. 325, 22 S. 716.

(o) *Remark of trial judge that he was not strong on expert testimony, and did not believe in broadening its scope.*

The remarks of the court during the progress of the trial, at which both parties called expert witnesses, made in response to an objection to a question on the cross-examination of an expert witness of the defeated party, that the court was not strong on expert testimony and did not believe in broadening its scope, but would permit the question, were not reversible error, where the court, in its instructions, stated that the jury were the sole judges of the credibility of the witnesses. *Herndon v. City of Springfield*, 137 Mo. App. 513, 119 S. W. 467.

(p) *Verbal request by the judge that the jury bring in a verdict as speedily as possible, but not to hasten deliberations.*

A verbal request by the judge, after delivering his charge, that the jury bring in a verdict as speedily as possible, but that they should not, in any degree, hasten their deliberations, was not objectionable, there being no intimation that the verdict was returned in undue haste or that the case was not fully considered. *Hermann v. Allen* (Tex. Civ. App.), 118 S. W. 794.

(q) *Court calling the jury's attention to the amount claimed.*

Instructions calling the jury's attention to the amount claimed, though improper, is not of itself ground for reversal. *Conlan v. R. Co.*, 139 Ill. App. 555.

- (r) *Remark of the court, after giving requested instructions, "Now, I will come back to my own instructions."*

A remark of the court, after giving requested instructions, that "Now, I will come back to my own instructions," is error, but is not prejudicial. *Maxwell v. Town of Wellington*, 138 Wis. 607, 120 N. W. 505.

- (s) *Judicial remarks, or impropriety, in order to reverse, must have probably tended to the prejudice of complaining party.*

Judicial remarks, or improprieties, in order to reverse a case must be of such a nature as that it is reasonably clear they would probably tend to the prejudice of the party against whom they were made. *Hill v. Corcoran*, 15 Col. 270, 279, 25 P. 171.

- (t) *Unwarranted remarks of trial judge, unattended by prejudice to complainant.*

Even though the remarks of the trial court may have been unwarranted and hasty, they will not reverse, unless prejudice appears to have resulted. *Collison v. R. Co.*, 146 Ill. App. 64; *judg't affm'd* (Ill. Sup.), 88 N. E. 251; *Sasnofksi v. R. Co.*, 134 Mich. 72, 95 N. W. 1077, 10 D. L. N. 360.

- (u) *Remarks of trial judge immaterial where jury returned the only verdict they properly could have rendered.*

Where the jury returned the only verdict they could properly have done, remarks of the trial judge are immaterial. *Conner v. Littlefield*, 79 Tex. 76. Where judgment substantially right, *Orcutt v. Isham*, 70 Ill. App. 102.

- (v) *Remarks of trial judge as to whether the evidence warranted the verdict.*

A trial judge, in overruling a motion for a new trial,

stated that it was doubtful whether the evidence warranted the verdict, but that the appellate court might think otherwise, and that, as the jury had twice before decided for plaintiff, he had no reason to think a new trial would result differently. Held that, while the judge's reasons were hardly correct, the appellate court, in passing upon the sufficiency of the record was confined to the record, and was not to be influenced by the trial judge's expression of opinion. *R. Co. v. Lauricello* (Tex. Civ. App.), 26 S. W. 302.

(w) *Remark of the court that an injunction pendente lite would be granted.*

Where, during the examination of a witness for defendants, on an application for an injunction, the judge remarked that an injunction pendente lite would be granted on the evidence then before the court, such action does not constitute reversible error, he having heard the whole case before finally deciding that such injunction should issue. *Maloney v. King*, 25 Mont. 188, 64 P. 351.

(x) *Remarks of the judge attempting to effect a reconciliation in a divorce case.*

Remarks made by the trial judge in attempting to effect a reconciliation in a divorce case; held, not ground for reversal. *Atherton v. Atherton*, 82 Hun 179, 64 St. Rep. 798, 31 N. Y. Supp. 977, affm'd, 155 N. Y. 129, 5 N. Y. Ann. Cas. 92.

(y) *Judgment will not be reversed because remarks of the court alleged to be inconsistent therewith.*

If relief was properly denied on the merits, the judgment will not be reversed because of remarks by the trial court before rendering the judgment, claimed to be inconsistent with the judgment. *Miles v. Miles*, 137 Mo. App. 38, 119 S. W. 456.

(z) *Opinion by the court upon policy of statute under consideration.*

The mere opinions or speculations of a judge on the policy of a statute under consideration are not the subject matter of a writ of error. *Oliver v. Phelps*, 20 N. J. L. 180.

(a-1) *Remark of court that charter exempting city from liability for negligence, and allowing recovery against the officers thereof, was unconstitutional.*

Where the complaint in an action against a city and its officers for injuries from a defective sidewalk did not state a cause of action against the officers, plaintiff obtained judgment against the city only, was not prejudiced by the remarks of the court that the charter exempting the city from damages for negligence was unconstitutional, as requiring a verdict for the officers. *Batdorff v. Oregon City* (Ore. Sup.), 100 P. 937.

(b-1) *Party testifying in his own behalf must show that he was prejudiced by unwarranted participation of the court in his direct and cross-examination.*

Unless it be shown that a party testifying in his own behalf was actually prejudiced by the unwarranted participation of the court in his direct and cross-examination, such fact can not be relied on as error. *Baur v. Beall*, 14 Col. 383, 23 P. 345.

(c-1) *Improper remark of court harmless when no other error intervenes.*

Remarks of the court in passing on objections to the evidence, when made without time or opportunity for reflection, even if not correct statements of the law, do not constitute error of such gravity as to call for a reversal, when no other error intervenes. *R. Co. v. Blume*, 137 Ill. 448.

(d-1) *Remarks of the judge to counsel as to the law of the case harmless, where they were later embodied in the instructions given.*

Remarks by the judge to counsel, in the presence of the jury, as to the law of the case, are not a ground of error, where the law is afterwards given to the jury to the same effect in written instructions. *Carlyle Canning Co. v. R. Co.*, 77 Ill. App. 396.

(e-1) *Remark by the court in the presence of the jury that he did not think the testimony of a witness important or material.*

Where it is developed on the examination of a witness that he had been subpoenaed by the opposite party, and had been directed to go home after he had told his story to the counsel, it is not reversible error for the court to state, in the presence of the jury, that he did not think such testimony important or material, since a jurymen of average intelligence would not be prejudiced or influenced thereby. *City of Elwood v. Addison*, 26 Ind. App. 28, 59 N. E. 47.

(f-1) *Erroneous opinion by the court as to defendant's liability.*

Where the court expressed an erroneous opinion in the hearing of the jury as to defendant's liability; held, not prejudicial, where the jury found for defendants upon the issues presented to them in the instructions of the court, and as it generally appeared that the jury were in no way influenced by the opinion. *Cotton v. Gorham*, 72 Iowa 324.

(g-1) *Harmless error of the court in expressing opinion on fact in the presence of the jury.*

Error of the court in expressing an opinion on a question of fact during the trial of the cause, in the presence of the jury, is harmless, where the undisputed evidence shows the

fact to be as stated by him in his opinion. *Gentry v. Kelly*, 49 Kan. 82, 30 P. 186.

(h-1) *Trial judge sharply directing witness to answer question was not prejudicial to defendant.*

Defendant was not prejudiced by the fact that the trial judge, directing one of the witnesses on cross-examination to answer a question promptly, saying to him sharply, "Mr. Witness, tell the jury, and do not stop to weigh the effect of your answer." *Bell & Coggs Co. v. Applegate*, 23 Ky. L. R. 470, 62 S. W. 1124.

(i-1) *Opinion of the trial judge as to the credibility of witnesses has great weight with supreme court.*

The judge below can disregard the testimony of witnesses, if he believes they are not telling the truth, and his opinion as to the credibility of witnesses will have great weight with the supreme court. *Howe v. Manning's Ex'r*, 13 La. Rep. 412.

(j-1) *Remarks of trial judge more disputative than judicial.*

Where the remarks of the trial judge in referring to the evidence on the question of vicinage, the district court was more disputative than judicial, but were not calculated to misrepresent the facts or prejudice the jury, it is not ground for reversal. *In re Reed's Est.* 86 Minn. 163, 90 N. W. 319; *Reed v. McIntyre*, Id.

(k-1) *Improper remarks of court and counsel in reference to affidavit of absent witness.*

Defendant offered to read the testimony of an absent witness which was contained in an application for a continuance. The attorney for plaintiff remarked, in the hearing of the jury, that the document was merely the affidavit of an

absent witness, and the court replied that, "it meant that, if this witness were in court, he would testify to what is contained in the paper." Plaintiff did not attempt to controvert the facts, and, on the theory on which the case was tried, it was not necessary for him to do so. Held that, while the remarks of both court and counsel were improper, defendant's case was not prejudiced thereby. *Hackman v. Gutweiler*, 66 Mo. App. 244.

(l-1) *Remark of the court, "The question is, what the lots were worth immediately before the grading was done and immediately after, etc."*

Where, in an action for damages to corner lots caused by the grading of a street, the city was attempting to show that plaintiffs had recovered damages for the grading of another street on another side of the lot, by cutting it down 20 feet, a remark of the court that, "The question is, what the lots were worth immediately before the grading was done and immediately after. P street (the one first graded) is just the same as if a ravine was there," was not harmful. *Robinson v. City of St. Joseph*, 97 Mo. App. 503, 71 S. W. 465; *Rollins v. Schwacker*, 153 Mo. App. 284, 133 S. W. 409.

(m-1) *Remark by trial judge that defendant's counsel was trying "to fool and hoodwink the jury."*

Remarks of the trial judge to the effect that defendant's counsel, in making a motion for a second adjournment of the case, was trying "to fool and hoodwink the jury." Held, not ground for reversal where, on submitting the case, the judge told the jury to disregard them. *Klinker v. Third Avenue R. Co.*, 26 App. Div. 322, 49 N. Y. Supp. 793, dist'g *Daly v. Byrne*, 77 N. Y. 182; *Williams v. R. Co.*, 126 N. Y. 96, 36 State Rep. 504.

- (n-1) *Remark by judge to counsel, "You have evidence of the injury sufficient for a big verdict, if the jury believes it."*

Remarks by the judge to counsel, "You have evidence of the injury sufficient for a big verdict, if the jury believes it," which the jury was subsequently instructed to disregard; held, not reversible error, where substantial justice was done by the verdict returned. *Reilly v. Eistman's Co.*, 28 Misc. 125, 58 N. Y. Supp. 1089, affm'g 27 Misc. 322, 57 N. Y. Supp. 825.

- (o-1) *Intimations of opinion by judge upon the evidence or merits of a case are immaterial where whole case is submitted to the jury by a proper charge.*

The mere intimation of an opinion by a judge upon the evidence or upon the merits of the case, or his comments on the evidence, though unfavorable to the party complaining furnish no ground for a reversal in this court, where the whole case was submitted to the jury upon a charge which lays down no improper rule of law. *Hurlbut v. Hurlbut*, 128 N. Y. 420, 21 Civ. Pro. Rep. 277, 40 State Rep. 46, affm'g 18 St. Rep. 407, 2 N. Y. Supp. 317.

- (p-1) *Remarks by judge to jury cured by qualifications he afterwards placed upon them.*

A statement by the trial judge concluding, "That is as I understand the evidence, but if that is not the evidence, I ask the jury to disregard entirely what I say on the subject; held, to be cured by the qualification that the statement was erroneous. *Meyer v. R. Co.*, 10 Misc. 11, 62 St. Rep. 649, 39 N. Y. Supp. 534.

- (q-1) *Remarks of court to counsel, where jury properly instructed, though improper, too slight to warrant reversal.*

Observations of the court to counsel, in the hearing of

the jury, during the progress of the trial, though open to criticism, if of but slight importance, will not warrant a reversal, where the jury were properly instructed that they were the sole judges of the evidence. *City of Guthrie v. Carey*, 15 Okla. 276, 81 P. 431; *Bank v. Yoeman*, 17 Okla. 613, 90 P. 412.

(r-1) *Remarks of the court as to the admissibility and sufficiency of evidence.*

Remarks of the court, in the hearing of the jury, as to the admissibility and sufficiency of the evidence, do not constitute reversible error when, under the facts of the case, they afford the party excepting thereto no just cause of complaint. *R. Co. v. Stuart*, 1 Tex. Civ. App. 642.

(s-1) *Court expressing opinion as to its understanding of the testimony of a witness.*

The misconduct of the court in expressing opinion as to its understanding of the testimony of a witness made, while overruling an objection to a question asked another witness, was not prejudicial, where the witness had testified as the court understood him. *Norfolk & P. Traction Co. v. O'Neill*, 109 Va. 670, 64 S. E. 948.

(t-1) *Improper remark by the court that deceased was run over and killed by defendant's car.*

Where the evidence shows beyond doubt that deceased was killed by being run over by defendant's car, a statement by the court to the jury that there is no dispute that he was so run over and killed, is not substantially prejudicial to defendant. *R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186.

(u-1) *Court examining witnesses and commenting on evidence.*

The examination of witnesses by the trial court, in an

action at law in a federal court, and commenting on their testimony, while a practice not to be approved, is not reversible error, where the matters commented on were not vital, and the jury were correctly instructed and told that they were the final arbiters on all questions of fact. *Klauder-Weldon Dyeing Mac. Co. v. Gaznon* (N. Y.), 183 F. 962, 106 C. C. A. 302.

(v-1) *In action for injuries to railroad employee, court asking whether up or down grade of ten percent was meant.*

Where, in an action for injuries to a railroad employee, after a question had been asked of an expert, and the court asked whether an up or down grade of ten percent was meant, plaintiff's counsel expressly disclaimed knowledge of the percent of the grade, and put the question again, assuming the engine to be going "slightly down grade," defendant was not prejudiced by the court's query, as assuming a percentage grade. *R. Co. v. Whitney*, 169 F. 572, 95 C. C. A. 70.

(w-1) *Court announcing at the close of the testimony that his mind was fixed and unalterable upon the merits.*

In an issue of *devisavit vel non* the court will not remand a cause for a rehearing, notwithstanding the irregularities committed by the trial judge in announcing at the close of the testimony that his mind was fixed and unalterably made up upon the merits of the case, and in assisting the argument of the prevailing party before its conclusion, with the remark that it was unnecessary, where the appellate court are satisfied from the testimony that justice has been done, especially in the provisions of the will, furnishes intrinsic evidence of its reasonableness, and the court and jury below concur in opinion, both as to the capacity of the administrator and the fairness of the will. *Beall v. Mann*, 5 Ga. 456.

(y-1) *Judge, in the presence of the jury, referring to the bad feeling existing between the parties.*

It appearing on the trial that much bad feeling existed between the parties, the court remarked; "Now, this is not a very pleasant affair. Taking the thing altogether it is a shocking affair, an unpleasant affair on both sides." In his charge the court explained to the jury that what he had said did not indicate that he had any feeling on either side, but merely that it was sad to see so much bitterness between relatives. Held, that although the remark was uncalled for, it was not prejudicial to defendant. *Ransom v. Bartley*, 70 Mich. 379, 38 N. W. 287.

(z-1) *Erroneous opinion by judge as to the legal effect of evidence.*

An erroneous expression of opinion by the court, in the course of the trial, as to the legal effect of certain evidence is rendered harmless by a subsequent statement, in open court, that the opinion so expressed was erroneous. *Craig v. Kelly*, 49 Mo. App. 312.

(a-2) *Court speaking of card published by plaintiff "as a mere piece of egotism," compensated for by reduction of verdict.*

Defendant introduced a card published by plaintiff. The court, in his charge, spoke of the card as "a mere piece of egotism." On direction of the court one-half of the verdict was remitted by plaintiff. Held that, even if such expression of opinion by the court was error, the remission was sufficiently large to remove all grievance of the defendant. *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349.

(b-2) *Expression by the court on the facts which inflicted no harm.*

Although the judge has expressed an opinion on the facts to the jury, in violation of the statutory provision, yet the

error does not require a reversal, where it can not have done any harm, as, where the opinion expressed related to facts adduced to show adverse possession, but the supreme court was of opinion that continuous possession for a sufficient time was not made out, in view of the facts established. *Thursby v. Myers*, 57 Ga. 155.

(c-2) *Expression of opinion by court as to the facts is not error if the questions upon which it is expressed are left to the jury.*

The expression of opinion by the court as to facts in a case, the weight of testimony, or the character of a witness, is not error, if the question upon which it is expressed is left for the determination of the jury. *Flowler v. Colton*, 1 Pinney (Wis.) 331.

(d-2) *While it was error for the court to state the substance and effect of testimony on a given point, it was not injurious in effect.*

It is improper for the court to state the substance and effect of the testimony upon a given point, but where it appears that no injury could have resulted such error is harmless. *Davis v. Remer*, 105 Ind. 318, 4 N. E. 857.

(e-2) *Remark by the court that he would "hold, as a matter of law, that Mrs. B was agent of defendant."*

Where it was in issue, whether a common terminal carrier was agent of defendant company under the contract sued on, a remark of the trial judge, in admitting testimony of such connecting carriers, employed as a witness, that he would "hold, as a matter of law, that Mrs. B was agent of defendant," is not prejudicial error, where the jury have been immediately admonished that they should disregard the remark, that it was expressed to attorneys, and that the jury would be instructed in writing as to the law at the proper time. *Judgm't R. Co. v. Elgin Con. Milk Co.*, 74

Ill. App. 619, affm'd, R. Co. v. Elgin Con. Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 338.

(f-2) *Remark by trial judge that both sets of bonds were parts of a fraudulent scheme to swindle investors not prejudicial error.*

In an action for the conversion of certain bonds, where other bonds were alleged to have been accepted by plaintiff as a pro tanto satisfaction, an expression of opinion by the trial judge that both sets of bonds were parts of a fraudulent scheme to swindle investors was not prejudicial error. Storrs v. Robinson, 74 Conn. 443, 51 A. 135.

(g-2) *Remark by court that there was nothing to cross-examine the witness about.*

Where, in an action on an account stated, plaintiff testified to interviews resulting, as he claimed, in the agreement as to the amount due, and to having written certain letters to defendant, and was permitted to offer evidence showing the condition of the account and the parties on his theory of the case, a remark by the court that there was nothing to cross-examine him about, except these interviews and letters, was not prejudicial to defendant. Judgm't 115 Ill. App. 615, affirmed, Dick v. Zimmerman, 207 Ill. 636, 69 N. E. 754.

(h-2) *Court referring to meagerness of evidence of one party.*

Reference by the trial judge to the meagerness of the evidence of one of the parties was not reversible error. Swing v. Walker, 27 Pa. Super. Court 366.

(i-2) *Remark by judge, that there was no evidence of the negligence of motorman, cured by charge leaving question to jury.*

Any error in remark of the judge, in the presence of the

jury, that there is no evidence of negligence of the motor-man of the car, is cured by his leaving to the jury the question of his negligence, and stating in the charge that when he said he should withdraw from their consideration any question of his negligence, he overlooked certain testimony, and that this testimony was for them, to be considered on that question. *Yunkeich v. R. Co.*, 75 N. Y. Supp. 86, 69 App. Div. 619.

(j-2) *Remark of judge, "a broker who had no more business honesty than that ought not to have had a commission from anybody."*

Where, in an action for a broker's commission, the evidence established that plaintiff was a broker and was the procuring cause of the sale, and it was claimed by defendants that the sale was made through two other brokers, a remark of the judge, during the examination of one of such brokers, on its appearing that he had been paid by the purchaser to induce the owner to sell at a lower price, "that a broker who had no more business honesty than that ought not to have had a commission from anybody," was not prejudicial. *Metcalf v. Gordon*, 83 N. Y. Supp. 808, 86 App. Div. 368.

(k-2) *Opinion by court that plaintiff might recover for time lost through sickness of adult children, cured by charge restricting recovery.*

In an action for injuries caused by allowing sewage to escape into a watercourse, the opinion of the court, to the effect that plaintiff could recover for the time lost, even for the sickness of his adult children, is not prejudicial error, where the judge restricted the jury to a recovery for loss of time to that of plaintiff's wife, by reason of her sickness. *City of San Antonio v. Diaz* (Tex. Civ. App.), 62 S. W. 549.

(l-2) *Remark by judge, "You are seeking to show that you informed the company of the improper conduct of the conductor."*

In an action for injuries to a passenger received from the alleged improper conduct of defendant's conductor, an objection to the question put to plaintiff by his counsel, the court said, "You are seeking to show that you informed the company of the improper conduct of the conductor." Held, that while the remark of the court was ill-advised, by reason of the use of the word "improper," it was not prejudicial error, as it could not be reasonably construed by the jury as an indication of any conclusion of the court. *Hirte v. R. Co.*, 127 Wis. 230, 106 N. W. 1068.

(m-2) *In action by children to recover for wrongful death of their father, remark by court that one was a deaf mute and required more for its support.*

In an action by children to recover for the death of their father, where the court instructed that if they could recover, the amount of the verdict would have to be limited to compensation to them for loss of what they could have expected from him for their support and education during their minority, a remark of the court that one of the plaintiffs, being a deaf mute, the father might have been liable to contribute more to such child's support than he ordinarily would, is not ground for reversal. *Delahunt v. Telegraph Co.*, 215 Pa. 241, 64 A. 515. So, of improper remarks on the measure of damages, *R. Co. v. Sonders*, 79 Ill. App. 41.

(n-2) *Trial court stating that it did not see why defendant objected to certain testimony, when it was squarely in his favor.*

Any error in the trial court stating that he did not see why the defendant objected to certain testimony, that it was squarely in defendant's favor, was harmless, where the comment could not have affected the result of the testimony on

the minds of the jury. *Sterling v. De Laune* (Tex. Civ. App.), 105 S. W. 1169.

(o-2) *To counsel's statement; "I wish to state the grounds of our objection," the court replied, "I don't care what your grounds are."*

A question having been put to a witness, and objection overruled, thereupon counsel said, "I wish to state the grounds of our objection," to which the court replied, "I do not care what your objections are," whereupon the witness answered the question. The question and answer were both proper. Held that, although counsel should have been allowed to state his objections, yet, that he was not permitted to do so, was not reversible error. *Concord Apartment House Co. v. O'Brien*, 228 Ill. 360, 81 N. E. 1038.

(p-2) *Remark by trial court, on objection to question, that while witness was insufficiently informed to testify, in deference to ruling of supreme court would overrule objection.*

The trial court, in response to an objection to a question, stated that, while he was satisfied upon principle, the witness was not sufficiently informed on the subject to testify, in deference to a possible construction of the opinion of the supreme court on a former appeal, he would overrule the objection. Held, that the fact involved having been established, without dispute, by witnesses for both parties, the remarks of the court were not prejudicial, and did not have a tendency to destroy the credibility of the witness. *Souчек v. Karr*, 83 Neb. 649, 120 N. W. 210.

(q-2) *Remark of trial judge, that he did not believe a question proper, calling for a witness's opinion as to whether there was any method whereby railroads could prevent switches being tampered with.*

Where, in an action for injuries to a railroad fireman by

running into a freight train, because of an open switch, the evidence preponderated in favor of the theory that the brakeman on the train standing near the switch had failed to close it, and it was improbable that the switch, after being closed, had been tampered with by somebody, and consequently, an erroneous remark of the court that he did not believe a question calling for a witness's opinion as to whether there was any method by which railroads could prevent switches from being tampered with was proper, though not objected to, was not prejudicial to defendant. *R. Co. v. Shepard* (Tex. Civ. App.), 118 S. W. 596.

(r-2) *Improper remark by court, on refusing motion to exclude plaintiff's evidence, "This is a case where a young boy got his leg broken."*

Where, in an action for injuries to a child, the court, on refusing a motion to exclude plaintiff's evidence, said, "This is a case where a young boy got his leg broken, and, as questions such as those arising in this case are continually coming up, this is a good case for the supreme court." It was not reversible error, the court having instructed the jury that he withdrew the remark, and that they must pay no attention to it. *Weinacker Ice & Fuel Co. v. Ott* (Ala. Sup.), 50 S. 901.

(s-2) *Remark by court that "It understood from its experience how these insurance companies do in fire cases."*

In an action on a fire policy remarks by the trial judge that "It understood from its experience how these insurance companies do in fire cases," while calculated to shake the confidence of the litigants in the impartiality of the court, was not reversible error, where the court, on appeal, finds the judgment correct. *Stephens v. Insurance Co.*, 139 Mo. App. 369, 123 S. W. 63.

(t-2) *Comment by the court on the weather, "It is well known in this part of Pennsylvania it would be almost impossible to answer, unless a man kept a record."*

The trial court, after refusing to allow a witness to testify as to what parts of the day, in the locality, were the warmest during the winter, added, by the way of comment, "It is well know hereabout, in this part of Pennsylvania, it would be almost impossible to answer that question, unless a man kept an actual record," and also, in substance, that the temperature might vary at the same hour on different days. Held, that as such language of the court referred to the evidence excluded, it could not be said that it did any harm. *Corrigan v. Wilkesbarre & W. V. Traction Co.*, 225 Pa. 560, 74 A. 429.

(u-2) *In action for wrongful death, comment by court, "That the question was, how much pecuniary loss had the relatives suffered?"*

Where, in an action for death, the court charged that damages could only be allowed decedent's wife to compensate her for the injury caused by the death, and specified the elements entering into her loss, the statement of the court, in referring to the comment by counsel to the jury that the question was, how much pecuniary loss had the relatives suffered? was not ground for reversal because misleading the jury as to the damages which might be awarded. *Boucher v. R. Co.*, 141 Wis. 160, 123 N. W. 913.

(v-2) *Improper remark by the court, "There has been no defense outlined here. We can not speculate."*

While it was improper for the court to say, during the examination of a witness, "There has been no defense outlined here. We can not speculate;" any error in making such remarks does not constitute ground for reversal. *Williamson v. R. Co.*, 159 Ill. App. 443.

(w-2) *Remark of judge denominating transaction between the parties as a plain steal by defendant.*

Remarks by the judge, on a trial without a jury, denominating the transaction between the parties as a plain steal by defendant, and likening the plaintiff to a man that fell among thieves, are not ground for reversal. *Smith v. Hurley* (Ore. Sup.), 143 P. 1123.

(x-2) *Remarks of trial judge implying that the preponderance of the evidence was contrary to the verdict.*

Remarks of the trial judge implying that the preponderance of the evidence was contrary to the verdict, could not afford ground for the granting of a new trial by the appellate court. *W. S. Forbes & Co. v. Wm. & J. J. Pearson*, 87 S. C. 67, 68 S. E. 964.

(y-2) *Remark of court, in passing on an offer to prove a fact, that it would not affect the case because party could have foreseen event.*

Where the court, in its charge, impressed on the jury that they were the sole judges of the facts, the remark of the court, in passing on an offer to prove a fact, that the fact would not affect the case, because the party could have foreseen an event, and should have provided against it, was not reversible error. *Black v. R. Co.* (S. C. Sup.), 69 S. E. 230.

(z-2) *Trial judges remark, that it would not be practicable to show a certain part of machinery, on a model prepared on a small scale.*

A trial judge's remark, that it would not be practicable to show a certain part of machinery on a model prepared on a small scale, was not reversible error. *Burroughs v. Curtis Lumber Co.* (Ore. Sup.), 114 P. 103.

- (a-3) *Trial judge asking a witness if he had been drinking, and then permitting counsel to cross-examine him on the subject.*

That the trial court asked a witness if he had been drinking, and then allowed counsel to cross-examine him on the subject, will not be held to be prejudicial error, where the testimony of the witness had been contradictory and his statements confused, and in settling the bill of exceptions the trial court stated that when the court asked the question, the court was of the opinion that the witness had not only been drinking, but was plainly intoxicated. *Traction Co. v. Crump*, 35 App. D. C. 169.

- (b-3) *In action for personal injuries; remark by court, "You will notice in all these cases, when testimony comes from plaintiff's family, he is the most perfect specimen of manhood," etc.*

In an action for personal injuries, where the court remarked in its charge touching damages, "You will notice that in all of these cases, that when the testimony comes from the plaintiff's family, he is the most perfect specimen of manhood imaginable before the accident, and is the most abject specimen afterwards," and the plaintiff excepted, and the court said, if counsel did not think it applied he would withdraw the statement, to which plaintiff also excepted, and the verdict was for defendant, it was not material, as it went only to the question of damages, and the jury found none, and the prefatory remark of the judge does not impair the withdrawal. *Todd v. R. Co. (Mass. Sup.)*, 94 N. E. 683.

- (c-3) *In action by husband for criminal conversation, statement by court, that a man who would marry a woman, live with her three weeks and then go, etc.*

Where in an action by a husband for criminal conversa-

tion, the evidence showed his prior marriage, and his abandonment of his first wife shortly after their marriage, the statement of the trial court, in the presence of the jury, that a man who would marry a woman and live with her only three weeks, and beget a child with her, and then go, was not very much different from a man who had connection with a woman without marriage, though improper, was not prejudicial, and must be disregarded, as required by Laws, 1909, chap. 192, sec. 3072m, it not appearing with any degree of certainty that, in the absence of such remark, the jury would have arrived at a different result. *Ward v. Thompson*, 146 Wis. 376, 131 N. W. 1006.

(d-3) *In action for wrongful death, remark of trial judge; "It seems to me, without authority, that it would be proper to ring a bell, and if not rung it would be negligence," etc.*

In an action to recover for defendant's alleged negligence in causing the death of plaintiff's decedent while doing work on a railroad, in which the engineer of the train was asked by defendant why he had not rung a bell, and answered that it was not customary, to which plaintiff objected, and the trial judge said, "It seems to me, without authority, that it would be proper to ring a bell, and if the bell was not rung, passing through that gang of workmen, it would be negligence; if the court held differently, all right, I am with the court if it does;" but the court later altered its view, and permitted the engineer to testify that a bell signal was not customary. Held, that the remarks of the trial judge were not prejudicial. *Barboza v. Pacific Portland Cement Co.* (Cal. Sup.), 120 P. 767.

(e-3) *Remark of trial judge that, "We all know that a man with a broken joint never will be as well as when the Lord made him."*

Any error in the remark of the trial judge in ruling in

defendant's favor on the admissibility of evidence that "We all know that a man with a broken joint never will get as well as when the Lord made him," was an abstract one, and not ground for reversal. *Willard v. R. Co.* (Minn. Sup.), 133 N. W. 465.

(f-3) *Inmateriality of mistake of the court when justice had been done.*

Where legal and equitable justice appears to be done by the verdict, a new trial will not be granted on account of a mistake of the judge in answering a sudden question put by a juror, after the regular charge given to the jury, which answer was not complained of by counsel, and which did not probably, although it might possibly, have operated upon the minds of some of the jury. *Train v. Collins*, 19 Mass. (2 Pick.) 145; *Newall v. Hopkins*, 6 Mass. 350.

(g-3) *Improper remarks by court cured by withdrawal and jury instructed to disregard.*

The court on the trial of an issue, made a remark calculated to prejudice the minds of the jury against defendant, but at the same time told the jury that that remark had nothing to do with the case and ought not to influence their verdict, and a verdict was rendered for the plaintiff. Held, that such remark was not ground for reversing the judgment on the verdict. *Brooks v. Calloway*, 12 Leigh (Va.) 466; *Roseberry v. Nixon*, 58 Hun 121, 11 N. Y. Supp. 523.

Sec. 125. Misconduct of counsel.

(a) *In action for negligent sale of injurious tablets, conduct of counsel in handing exhibit, without permission, to the jury.*

In an action for the negligent sale of injurious tablets, conduct of counsel in handing exhibits to the jury, when it retired, without permission of the court, was an im-

material irregularity. *Wilson v. Faxon, Williams & Faxon*, 117 N. Y. Supp. 361, 63 Misc. Rep. 561.

- (b) *Counsel saying that plaintiff stood defendant's action about the same as one would who was being crucified.*

Counsel's remark that plaintiff stood defendant's action about the same as one would who was being crucified, though improper, was harmless error, when the court instructed the jury to pay no attention to it. *Grenier v. Hild*, 124 Mich. 222, 82 N. W. 1052, 7 D. L. N. 19.

- (c) *Not misconduct for counsel to warn jury to be careful to answer interrogatories to conform to the verdict.*

It is not such misconduct as amounts to reversible error that counsel of one of the parties caution the jury, that the attorney for the other party in the case had filed interrogatories for them to answer, and that the jury should be careful to have their answers conform to the verdict. *Fruchy v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

- (d) *Improper reference of counsel in argument to letter not introduced in evidence cured by instruction to disregard it.*

Improper reference by counsel, in his argument to the jury upon the truthfulness of the testimony of the defendant to the authenticity of a copy of a letter, which was not introduced in evidence, instead of referring, as counsel properly might, to a destroyed letter, about which defendant had testified, is not a sufficient cause to justify a reversal. In the absence of an instruction from the record, it will be presumed, upon appeal, that the improper reference was corrected by the instructions of the court to disregard it. *Clark v. Fast*, 128 Cal. 442, 79 Am. St. R. 47, 61 P. 72; *R. Co. v. Pelletier*, 134 Ill. 120; *R. Co. v. Call*, 143 Ill. 177.

(e) *Clearly right verdict cures improper remarks of counsel.*

Whether the remarks of plaintiff's counsel were harmful to the defendant or not, the verdict will not be disturbed where it is clear that it was for the right party. *Riley v. R. Co.*, 68 Mo. App. 652; *Sackewitz v. American Biscuit Co.*, 78 Mo. App. 144; *R. Co. v. Whittaker*, 22 Ky. L. R. 395, 57 S. W. 465; *Chamberlin v. R. Co.*, 122 Mich. 477, 81 N. W. 339, 6 D. L. N. 798; *R. Co. v. Avis* (Tex. Civ. App.), 91 S. W. 877; *Patterson v. Hawley*, 33 Neb. 440, 50 N. W. 324; *Christensen v. Lambert*, 66 N. J. L. 531, 49 A. 577; *Kettler v. O'Neil* (Tex. Civ. App.), 122 S. W. 900.

(f) *Improper suggestion by plaintiff's counsel of an amendment to an instruction.*

While it is improper for counsel to suggest, in the hearing of the jury, instructions to be given, the suggestion by plaintiff's counsel of an amendment to an instruction which was favorable to defendant, is harmless. *Buckley v. R. Co.*, 215 Mass. 50, 102 N. E. 75.

(g) *Argument of plaintiff's counsel that the plea of contributory negligence had always been and always would be employed by defendants.*

Where, in an action for negligent death, defendant relied on contributory negligence, and the evidence on the issue was conflicting, the closing argument of plaintiff's counsel that the plea of contributory negligence had always been and always would be put forth as the only plea when one was sued for negligent death, though improper, was not ground for reversal. *Buckles v. Reynolds* (Wash. Sup.), 108 P. 1072.

(h) *Remark of plaintiff's counsel, that to question jurors, on their voir dire, whether they would give the same consideration to a railroad company, was an insult to their intelligence.*

Remarks of plaintiff's counsel in his opening statement to

the jury that the question to jurors, on their voir dire, whether they would give the same consideration to a railroad company as to an individual, was an insult to the intelligence of the jury, while improper, was not ground for reversal. *R. Co. v. Earle* (Ark. Sup.), 146 S. W. 520.

- (i) *Reading in the presence of the jury affidavit to procure special judge, and comment of regular judge on vacating the bench.*

The reading, in the presence of the jury, of the affidavit filed by defendant to procure a special judge, and the comments of the regular judge in vacating the bench, if error at all, do not authorize a reversal. *Insurance Co. v. Bland*, 19 Ky. L. R. 287. 40 S. W. 670.

- (j) *Unfair and improper opening statement of counsel.*

The appellate court will not set aside a verdict because of an unfair and improper opening statement of counsel, unless the jury have been plainly prejudiced thereby. *Porter v. Throop*, 47 Mich. 313, 11 N. W. 174.

- (k) *Person alighting from train stated that it took twenty minutes to walk from seat to car-steps, counsel suggested twenty seconds, to which correction witness assented.*

In an action for injuries in alighting from a train, the injured person was asked how long it took her to walk from her seat to the car-steps, and stated that it did not take twenty minutes. One of plaintiff's counsel suggested in a voice loud enough for witness to hear that didn't she mean twenty seconds, and on being asked what she meant when she said twenty minutes, said she meant twenty seconds. Held, that the suggestion of the counsel as to what she meant was improper, but was not reversible error. (*Tex. Civ. App.*) *R. Co. v. Ritchey*, 108 S. W. 732.

- (l) *Misconduct of counsel in emphasizing objection to leading question, "Why can't he ask him what he did? There is only one reason, he wants to tell the jury as near as he can."*

The jury will be presumed to have disregarded misconduct of counsel, in saying to the court, to emphasize his objection to the question as leading, "Why can't he ask him what he did? There is only one reason, and that is, he wants to tell the jury as near as he can." *Withey v. Fowler Co.* (Iowa Sup.), 145 N. W. 923.

- (m) *Improper question by counsel, "You had some difficulty, did you not, with non-union labor concerning the filling under that floor?"*

Held, that the asking of the following question, "You had some difficulty, did you not, with non-union labor concerning the filling under that floor?" though not pertinent to any issue in the case, did not constitute such conduct as would justify a reversal, where the question was objected to, and the objection immediately acquiesced in by counsel asking the objectionable question. *Weber v. Noyes*, 151 Ill. App. 597.

- (n) *Counsel applying an opprobrious epithet to a witness.*

For counsel in cross-examination to use an opprobrious epithet to him, though unwarranted, is not of itself ground for reversal, notwithstanding there was no explanation or apology. *Miller v. Freeman* (Tex. Civ. App.), 127 S. W. 302.

- (o) *Misconduct of counsel in remarking, when plaintiff was asked what doctor waited on her, that it might be agreed it was "the insurance company's doctor."*

Judgment for plaintiff in a personal injury case will not be reversed for misconduct of his counsel in stating, when plaintiff was asked as to what doctor waited upon him, that

it might be agreed that it was the "insurance company's doctor," referring to the company in which defendant carried employer's accident liability insurance, where the court admonished the jury that the remark was improper, and where there was abundant proof to sustain the judgment. Ky. Wagon Mfg. Co. v. Duganics (Ky. Ct. App.), 113 S. W. 128.

(p) *Only where verdict is against preponderance of the evidence will improper remarks of counsel constitute reversible error.*

As a general rule, it is only where the verdict is against the preponderance of the evidence that appellate courts will hold that improper remarks of counsel will constitute reversible error. R. Co. v. Hawkins (Tex. Civ. App.), 108 S. W. 736; R. Co. v. Adams (Tex. Civ. App.), 121 S. W. 876.

(q) *In an action for wrongful death, plaintiff's counsel remarked, "Some of this is for you, Mr. R. You are a motorman; a whole lot of this stuff is for you."*

In an action for the death of plaintiff's intestate, who was killed by being run over by a street car, plaintiff's counsel, in his argument, in referring to certain evidence said, "Some of this is for you, Mr. R. You are a motorman; a whole lot of this stuff is for you." Defendant's counsel objected to the addressing of a juror by name, which objection was sustained. Held, that counsel's remarks were not of such a prejudicial character as to require a reversal. Judgm't 129 Ill. App. 511, 82 N. E. 335, affm'd, R. Co. v. Strong, 230 Ill. 58.

(r) *Plaintiff's attorney insisting that all but one child were adults was not prejudicial error.*

Where, in a personal injury action, the court ruled that

evidence of the ages of the children of plaintiff was inadmissible, the action of plaintiff's attorney in persisting in showing that all but one child were adults, was not reversible error. *McDonald v. City Electric Ry. Co.*, 144 Mich. 379, 108 N. W. 85, 13 D. L. N. 252.

(s) *Harsh question by counsel not gross misconduct.*

Asking a leading question for the defense, whether he is a brother of M, "who is serving a term in the penitentiary for killing his wife," was not such gross misconduct as to require a reversal, the same question having been asked on a former trial, without objection. *Byrne v. Morell*, 20 Ky. L. R. 1311, 49 S. W. 193.

(t) *Improper remarks by counsel to a witness, where the latter's testimony showed same not misapplied.*

A judgment will not be reversed because of improper remarks to a witness, where the witness, by his testimony, showed such a character that the remarks may be regarded as harmless. *Joliet St. Ry. Co. v. Call*, 42 Ill. App. 41, Cf. 143 Ill. 177.

(u) *Judgment will not be reversed for irrelevant remarks of counsel.*

The judgment will not be reversed because of irrelevant remarks by counsel, where it can not be seen that the adverse party was prejudiced. *R. Co. v. Cotton*, 41 Ill. App. 311. Nor for uncensured improper, but unprejudicial remarks, *R. Co. v. Middletown*, 142 Ill. 550.

(v) *Misconduct of attorney in attempting to show that, after plaintiff was hurt, a priest administered extreme unction.*

Misconduct of attorney in attempting to show that, after plaintiff was hurt, a priest administered extreme unction, was

held not prejudicial, where the court stopped him, and directed the jury not to consider such matter. *R. Co. v. Sweeny*, 157 Ky. 620, 163 S. W. 739.

(w) *Counsel's improper language uninfluencing jury.*

Though some of the language of counsel for plaintiff in support of his right to ask a certain question was improper, the court will not reverse the judgment, where it is satisfied that the jury would have declared the same verdict had the remarks not been made. *Daniels v. Weeks*, 90 Mich. 190, 51 N. W. 273; *R. Co. v. Smith*, 124 Ill. App. 627; *R. Co. v. Same*, judgm't affm'd, 80 N. E. 716.

(x) *Counsel charging that railroad had for years been overcharging fare between two points on its road.*

In an action against a railroad for ejecting a passenger for refusing to pay the amount of fare demanded, plaintiff's counsel in argument, said that the company had largely overcharged between the two points in question for twenty-five years, and that \$5,470 had gone into the box of the company between those points, but that, according to reports, the road had spent \$63,024 the past year in litigation, all of which was taken from the people. Held, that though the statements were outside the record, and deserved the severest censure, substantial injury was not done defendant, the verdict not being excessive. *Chamberlain v. R. Co.*, 122 Mich. 477, 81 N. W. 339, 6 D. L. N. 798.

(y) *Counsel misstating a witness's testimony where no prejudice resulted.*

Inaccuracy of counsel in stating to the jury the testimony of a witness is not ground for a new trial, where it is apparent that no prejudice could have resulted. *Rheiner v. Union Depot St. R. & T. Co.*, 31 Minn. 193, 17 N. W. 279.

(z) *Counsel contrasting the financial situation of contending parties.*

On the trial of an action for personal injuries, counsel, in his argument, drew a contrast between the financial situation of the parties, and the court at once told the jury, in substance, that the parties must be regarded as upon an equal footing. No further instructions were asked as to the argument by the counsel for defendant. Held, that such arguments, though improper, were not ground for reversal. *Davis v. City of Adrian*, 147 Mich. 300, 110 N. W. 1084, 13 D. L. N. 1023.

(a-1) *Counsel, in argument, asking why defendant served notice on agent to help defend the suit.*

The fact that counsel for plaintiff referred to a letter in argument, asking why defendant served notice on the agent to help defend the suit, and stating it was because they knew their negligent acts made them liable, though improper, was not ground for reversal of a judgment for plaintiff, where the court, in its charge, took pains to remove any false impressions that might have been caused thereby from the minds of the jury. *Shaw v. R. Co.*, 123 Mich. 629, 82 N. W. 618, 49 L. R. A. 308, 81 Am. St. Rep. 230, 7 D. L. N. 77.

(b-1) *Remark by plaintiff's counsel that the jury knew, if a robbery was committed in an inn, in nine cases out of ten the perpetrator was a servant or agent therein.*

In an action against an innkeeper for the value of property stolen from a guest, a remark of plaintiff's counsel, that the jury knew that, if a robbery was committed in a house, in nine cases out of ten the person who did it was a servant or agent in the house, was improper, but in view of testimony indicating culpability of defendant's servants, is not

cause for reversal. Kerlin v. Swart, 143 Mich. 228, 106 N. W. 710, 12 D. L. N. 924.

(c-1) *Abuse of privilege by counsel will not reverse when moderate verdict shows it did not affect the jury.*

While it was improper for counsel for plaintiff, in his argument to the jury, to go outside the record and comment on the wealth of the defendant railroad company and the poverty of plaintiff, and to state that plaintiff brought his suit for only \$2,000, to prevent a transfer of the case to the federal court, with its attendant expenses, yet, as the verdict is not so large as to indicate that it was the result of such improper remarks, there can be no reversal on that account. R. Co. v. Whittaker, 22 Ky. L. R. 395, 57 S. W. 465.

(d-1) *Counsel reading opinion of court of appeals to the jury, as to the value attachable to evidence of confessions.*

It is harmless error for counsel to read to the jury a quotation from the opinion of the court of appeals as to the value to be attached to the evidence of confessions. Ky. & Ind. Bridge Co. v. Cecil, 14 Ky. L. R. (abst.) 477.

(e-1) *Improper conduct of counsel in exhibiting to jury, with comment an amendment to an instruction added by the court by interlineation.*

On the trial of an action, plaintiff's attorney exhibited to the jury an instruction which defendant had requested, and which the court had amended by interlineation, and called their attention to the amendment, the occasion of this conduct was not disclosed by the bill of exceptions. Held, that while the counsel's conduct was improper, it was not ground for reversal. Bd. of Com'rs of Clay Co. v. Redifer, 32 Ind. App. 93, 69 N. E. 305.

(f-1) *Improper reference by counsel to amount of verdict at former trial.*

An improper reference by counsel to the amount of the verdict upon a former trial may be overlooked, where the damages awarded are not so excessive as to afford ground for a new trial. *Payne v. Irvin*, 44 Ill. App. 105. Cured by instructions to disregard, *Cole v. Fallbrook Coal Co.*; 87 Hun 584, 68 St. Rep. 636, 34 N. Y. Supp. 572, aff'd 159 N. Y. 59.

(g-1) *In an action for negligence, counsel, in examining witness, said, "There are other accidents, I am told, that happened there."*

A judgment will not be reversed because counsel, in examining a witness, in an action for negligence, said, "There are other accidents, I am told, that happened there," where, upon objection, the judge remarked, "That is not right to state to the jury," to which the counsel replied, "I state that to the court, not to the jury." Thereupon the court rejoined, "It is highly improper to state anything about it," and that was all. *Chicago v. Leseth*, 142 Ill. 642.

(h-1) *In action for injuries to married woman, counsel inquiring of the jury how much they would take for having their wives run down in the public street and made the spectacle of a crowd.*

The argument of counsel of a married woman suing for personal injuries sustained by reason of being struck by defendant's wagon negligently driven, inquiring of the jury how much they would take for having their wives run down in the public street and made the spectacle of a crowd on the street, was not prejudicial. *Adams Exp. Co. v. Aldridge* (Col. App.), 77 P. 6.

(i-1) *Counsel reading the portion of the answer which had been stricken out to the jury.*

The mere fact that plaintiff's counsel read in his address to the jury a portion of the answer which had been stricken out is not error of itself. *Morgan v. Hugg*, 5 Cal. 409.

(j-1) *Improper conduct of counsel where the remarks are not calculated to excite or prejudice the jury.*

A judgment will not be reversed where the remarks are not calculated improperly to excite or prejudice the jury. *R. Co. v. Long*, 52 Ill. App. 671; *Kennedy v. Sullivan*, 34 Ill. App. 46.

(k-1) *Only in cases where injustice apparently results through improper conduct of counsel will a judgment be reversed for such cause.*

It is only in cases where it is plain that injustice has resulted through improper arguments of counsel that a judgment will be reversed for such cause. *Harms v. Steir*, 67 Ill. App. 634; *McDonald v. Bank*, 72 Ill. App. 17; *City of Rome v. Stewart*, 116 Ga. 738.

(l-1) *Plaintiff's counsel alluding to the poverty of his client, preventing resort to an appellate court.*

In an action against a railway company for injuries, argument of plaintiff's counsel to the jury, "that the railway company can appeal, but the plaintiff is a poor man and has no money to appeal with, and will have to accept what you do," though error, is not alone sufficient to authorize a reversal. *R. Co. v. Morgan*, 23 Ky. L. R. 121, 110 Ky. 740, 62 S. W. 736. Referring to plaintiff as a widow, getting her nickel by pulling a thread, *Fleming v. R. Co.*, 163 Ill. App. 185. Saying that plaintiff was an old lady who had nothing. *Brady v. Springfield Traction Co.*, 140 Mo. App. 421, 124 S. W. 1070; *Tuck v. Same*, 140 Ill. App. 335, 124 S. W. 1079.

Saying that a large verdict would more likely stop appeal, R. Co. v. Bromberg, 141 Ala. 258, 37 S. 395.

(m-1) *Counsel stating that defendant had been fined \$500 for shooting and wounding.*

In an action to recover damages for malicious shooting and wounding, the statement of plaintiff's counsel, in argument, that defendant had been fined \$500 for shooting and wounding, for which plaintiff sought to recover damages is not prejudicial to defendant, as it showed that he had already been punished to some extent. Frazier v. Malcolm, 22 Ky. L. R. 1876, 62 S. W. 13.

(n-1) *Counsel improperly reading law books to the jury.*

The appellate court will not reverse because counsel read from law books before the jury were instructed, or afterwards, if the law read afterwards accorded with the instructions. Bloyd v. Pollock, 27 W. Va. 75.

(o-1) *Plaintiff's counsel, in opening his case to the jury, remarked that, "after a lapse of fourteen years defendant made an offer of judgment."*

Plaintiff's counsel, in opening his case to the jury, remarked that, "after a lapse of fourteen years defendant made an offer of judgment," to which remark defendant excepted. Held that, while the remark was improper, and counsel for plaintiff had no right to prove the offer, it was not an error which would justify the reversal of a judgment for plaintiff. Brusie v. Peck, 62 Hun 620, 16 N. Y. Supp. 648; Riche v. Martin, 17 N. Y. Supp. 723.

(p-1) *Court permitting plaintiff's counsel to indulge in the denunciation of the defendant.*

It is improper to allow the plaintiff's counsel, while summing up to the jury, to indulge in the denunciation of defendant, in an assumption of fact not proved, but in such

case, though defendant objects on that ground to the making of such remarks, and the court responds, "I will say to the jury whatever is proper to be said at the end of the matter," and thereupon defendant excepts to the refusal of the court to then stop plaintiff's counsel, a new trial will not be granted by reason of that exception. *Fry v. Bennett*, 16 N. Y. Super. Court (3 Bosworth) 200.

(q-1) *Counsel asking the jury if they would accord credit to the testimony of the principal witness, who was a convict.*

A reversal can not be had for the overruling of an objection to a statement of plaintiff's counsel to the jurors, after they were called, that plaintiff's principal witness was a convict, and his asking them whether the fact would prejudice them against believing the witness, if his testimony, in other respects, appeared trustworthy, or was corroborated, where it does not appear that any of the jurors answered the question, or that any challenge was interposed in consequence of any information derived from the question. *Carson v. Winterson* (N. Y. Court Appeals), 42 N. E. 347.

(r-1) *Improper remark of counsel, "What is the feeling toward an intelligent man who takes advantage of a poor man's ignorance?"*

In an action for services, it appeared that defendant gave plaintiff, who could not read, a check for \$5, on which was written, "balance in full to date." Plaintiff cashed the check and testified that the balance due him was \$36, and that sometime later defendant drew a check for \$18, and offered it to plaintiff in full settlement, which plaintiff refused to receive. Defendant testified that he called plaintiff's attention to what was written on the \$5 check, and told him that if he accepted it, it would be in full settlement of his claim, and that no check was afterwards offered. Held,

that the question asked of the jury by the plaintiff's counsel in argument, "What is the feeling toward an intelligent man who takes advantage of a poor man's ignorance?" though erroneous, as based on the assumption of defendant's misconduct, was not reversible error. *Bushey v. Northrop*, 78 Vt. 430, 62 A. 1015.

(s-1) *Improper remark by counsel, upon the question of damages, where verdict was for defendant.*

In an action by a husband for an assault upon his wife, plaintiff testified on the question of damages, that during his wife's illness he was obliged to hire certain help. Defendant's counsel, in argument, stated that plaintiff had hired two men, and that they knew whether his wife was sick or well, and then asked why plaintiff did not call these men as witnesses. No question was made, however, but that plaintiff's wife was sick, as claimed by him, and the counsel making the statement complained of, claimed that it was made upon the question of damages, and the verdict being for defendant, plaintiff was not harmed thereby. *McKinstry v. Collins*, 74 Vt. 147, 52 A. 438; *Olfemann v. R. Co.*, 125 Mo. 408, 28 S. W. 742, 46 Am. St. Rep. 483.

(t-1) *Improper remark of counsel that delay permitted debtors to put their property out of the reach of creditors.*

In an action against a surety on notes, remarks of plaintiff's counsel to the jury that defendant did not sign the notes as an act of charity, and if they were paid by a note not in suit, it would result in delay only, and that delays sometimes allowed debtors to put their property beyond the reach of process, though not justified by the evidence, did not harm defendant, where the jury found for him on the issue of payment, but not as to his entire claim in set-off. *Bank v. Hunt*, 71 Vt. 251, 44 A. 347.

- (u-1) *Refusal to exclude remark of counsel that, afraid of a jury, complainant brought suit in a court of equity.*

In a suit in equity on a note which defendant claimed was a forgery, a record of a suit at law on the note, which was dismissed without trial, was admitted to show that defendant denied having signed it as soon as he had knowledge of its execution. Defendant's counsel, in argument, stated that when defendant was sued before the justice he obtained justice, that the case was appealed to the circuit court, and defendant demanded a jury, but complainant, being afraid of a jury, dismissed the case, and brought it to this court to get rid of a jury. Held, that a refusal to exclude such remarks was not reversible error, as the opposite party had an opportunity to reply. *Furnish v. Burge* (Tenn. Chy. App.), 54 S. W. 90.

- (v-1) *Improper reading by counsel of the evidence in a previous trial.*

The counsel of the successful party below was permitted, in his concluding argument, to read from a bill of exceptions of a previous trial a portion of the evidence of a witness then examined, but although in attendance as a witness for the plaintiff, not examined on the last trial, the testimony being read for the purpose of illustrating a point of law settled by the opinion of the supreme court, and, in connection with the opinion, the circuit judge instructed the jury not to regard it as evidence in the case. Held, of questionable propriety, but not sufficient to reverse. *Garvin v. Luttrell*, 10 Humphreys (29 Tenn.) 16.

- (w-1) *Plaintiff's counsel reading newspaper report of charge of the court in a libel case.*

That plaintiff's counsel, in summing up, read from a newspaper report a charge of the court, in an action of the same

kind as the one at bar for libel, a reference in the charge by the trial judge, with approval of the opinion upon the law expressed in the charge in the other action, is not ground for a new trial, where the questions of fact are fully left to the jury. *Rosenwald v. Hammerstein*, 12 Daly 377, dist'g *Reich v. Mayor, etc.*, of N. Y., 12 Daly 72, 17 Weekly Dig. (N. Y.) 141. Referring to article in defendant's newspaper relating to the case, *Tingley v. Times Mirror Co.* (Cal. Sup.), 89 P. 1097.

(x-1) *Improper remarks of counsel that case had been remanded from the United States Court.*

Argument of counsel in a personal injury action against a railroad, referring to the fact that defendant had removed the case to a federal court, and that the circuit court of appeals had remanded it to the state court, while improper, was not reversible error, where the jurors already knew that the case had been removed, and the court, in its instructions, bound the jury to return their verdict upon the evidence and the law. *Burch v. R. Co.*, 32 Nev. 75, 104 P. 225.

(y-1) *Reading stipulation and mandate on appeal to the jury.*

Where defendant stipulated that its liability should depend upon the outcome of an appeal in another case, which was decided adversely to the defendant, the reading of the stipulation and the mandate to the jury, neither of which showed the amount of damages, was not prejudicial, for the defendant had conceded its liability. *Witty v. Springfield Traction Co.*, 153 Mo. App. 429, 134 S. W. 82.

(z-1) *Counsel asking jury to allow plaintiff what they would demand for the loss of an eye.*

The action of plaintiff's counsel, in his argument to the jury in an action for an assault and battery causing the destruction of an eye, in asking the jury to allow plaintiff what

they would demand for the loss of an eye, was not prejudicial to defendant, where the jury returned a verdict in the same amount as was rendered by two juries in preceding trials. *Obschiel v. Scott*, 106 Mo. App. 583, 80 S. W. 982.

(a-2) *Reference by plaintiff's counsel, in argument, to the amount of damages claimed.*

A mere reference of plaintiff's counsel in argument to the amount of damages claimed by him is not prejudicial error. *Kulvie v. Bunsen Coal Co.*, 161 Ill. App. 617, Judgm't affm'd, 253 Ill. 386, 97 N. E. 688.

(b-2) *Counsel improperly telling the jury that on former trial the verdict had been for defendant.*

Where plaintiff was not entitled to recover on the facts, and it appeared during the colloquy between counsel the jury had been informed that the issue had been determined against plaintiff on a prior trial, she was not harmed by argument of defendant's counsel in which he erroneously stated that the verdict on the former trial had been for defendant, and sought to induce the jury to follow the path of their predecessors. *Bishop v. Investment Co.*, 229 Mo. 699, 129 S. W. 668; *Pierce v. Brennan*, 88 Minn. 50, 92 N. W. 507.

(c-2) *In action for personal injuries, plaintiff's attorney referring to plaintiff's suffering from the thought that he could not support his wife and children.*

In an action for personal injuries, where the plaintiff's attorney, referring to plaintiff's suffering when he thought he could not support his wife and children, and there was no evidence that he had any children, such an argument would not influence a jury of common understanding and intelligence, especially where the court instructed the jury to disregard the statement. *Yellow Pine Paper Mill Co. v. Lyons* (Tex. Civ. App.), 159 S. W. 909.

- (d-2) *Remark of plaintiff's counsel, that defendant's failure to introduce evidence to rebut presumption of negligence raised was a confession.*

Remarks of plaintiff's counsel, in argument, in an action against a street-car company for injury from being struck by a projection from a passing car, that defendant's failure to introduce evidence to rebut the presumption of negligence raised was a confession of negligence, were not so prejudicial to defendant as to be reversible error. *Burns v. R. Co.* (Mo. App.), 158 S. W. 394.

- (e-2) *Violent and extravagant language used by counsel in his closing address to the jury.*

Violent and extravagant language used by counsel in his closing address to the jury is not ground for reversal, where it in no manner affects the verdict. *Johnson v. R. Co.*, 174 Ill. App. 148.

- (f-2) *In personal injury action, argument of plaintiff's counsel that a map of place where injury occurred was not proven correct.*

In a personal injury action, argument of plaintiff's counsel that the map of the place in the county where the injury occurred, not having been proven to be correct, and having been made by defendant, presumably showed the location as favorable to defendant as possible, held harmless. *Con. Coal Co. v. Cole's Adm'r*, 155 Ky. 139, 159 S. W. 668. Improper remarks of counsel as to defendant's exhibits, *Berry v. Doolittle*, 82 Vt. 471, 74 A. 97.

- (g-2) *Remark by plaintiff's counsel, in action for death of section hand, "Now, there should have been either signals or the men on such a day."*

A remark of plaintiff's counsel, in argument, in an action for a section hand's death, "Now, there should have been either signals or the men on such a day," was not prejudicial

to defendant, though the absence of signals was not a ground of negligence relied on. *Gentry v. R. Co.* (Mo. App.), 156 S. W. 27.

(h-2) *In personal injury action, counsel referring to mis-carriage suffered by plaintiff therefrom.*

In a personal action it was not reversible error for defendant's attorney, in his argument, to allude to a mis-carriage suffered by plaintiff from the accident, where no special recovery was demanded therefor. *Pearll v. Bay City* (Mich. Sup.), 140 N. W. 938.

(i-2) *Improper argument of counsel in personal injury case, in referring to evidence ruled out, and in appealing to sympathy of the jury, etc.*

Improper argument of counsel in a personal injury case, in referring to evidence that has been ruled out, and to his efforts to find witnesses, a matter outside the record, and in appealing to the sympathy of the jury, will not reverse, where the address of counsel for the defendant tended to prove a reply, the trial judge promptly rebuking the attorney, in the presence of the jury, instructing them to disregard the remarks, three trials having been had, and it is not urged that the verdict for \$10,000 is excessive. *Appel v. R. Co.*, 172 Ill. App. 421.

(j-2) *In action for injuries from defective highway, false statement of one counsel that the other said he had a witness to testify that the persons in the vehicle were intoxicated.*

In an action for injuries from a defective highway, false statement of plaintiff's counsel, in argument, that defendant's counsel had stated that he had a witness who would testify that the persons in plaintiff's vehicle were intoxicated, held harmless. *Johnson v. Town of Iron River*, 149 Wis. 139, 135 N. W. 522.

- (k-2) *In action for injury to employee who fell down elevator shaft, plaintiff's counsel stating that he would prove a gate was provided after the accident.*

In an action for injury to a tenant's contractor's employee who fell down a freight elevator shaft, error in plaintiff's counsel stating, in his opening, that he would prove that a gate was provided after the accident, to show whose duty it was to provide a gate, was harmless, where the evidence was excluded, and it appears, as a matter of law, that the duty rested on defendant. *Barfoot v. White Star Line* (Mich. Sup.), 136 N. W. 437.

- (l-2) *In action for death by electric car, argument of defendant's counsel that a verdict for plaintiff would convict the motorman of murder.*

Argument of defendant's counsel to the jury, in an action for the running of an electric car over a person, that a verdict for plaintiff would convict the motorman of murder is, at most, misleading, and not prejudicial to substantial rights, as plaintiff's counsel has the closing argument. *Bell's Adm'r v. R. Co.*, 148 Ky. 189, 146 S. W. 383.

- (m-2) *In action for false imprisonment, plaintiff's counsel saying to the jury, "What would you think you were entitled to under the circumstances?" etc.*

In an action for false imprisonment by procuring the unlawful commitment of plaintiff for refusing to recognize as a witness, on appeal of a criminal charge against defendant herein brought before a justice, plaintiff's counsel stated that he thought that the jury could consider, in awarding damages, "What you would think you were entitled to under the circumstances, what you would think it had damaged you, your feelings, if you had been subjected to that," whereupon the court said, that the jury had to find what the

damage was to plaintiff, and not to themselves. Counsel replied that he stated that would not be the absolute test, but that they could consider it. Defendant's counsel excepted, and remarked that a certain thing was the law, regardless of the court's charge, whereupon the court said that the jury must take the law from it, and not from the counsel. Plaintiff's counsel then continued, that it was not what the jury would judge in money to be subjected to the humiliation imposed upon plaintiff, but the jury could consider that in awarding damages. Held, that the argument was not reversible error, in view of defendant's counsel not asking for any further rulings, the judge having correctly charged in the matter of damages, and the verdict not being clearly excessive so as to have resulted from prejudice or passion. *Bates v. Kitchell* (Mich. Sup.), 132 N. W. 459.

(11-2) *Statement by counsel as to facts shown by an almanac not offered in evidence.*

A statement by counsel, made without objection, as to facts shown by an almanac not offered in evidence, are not prejudicial. *Traction Co. v. Kettler*, 31 O. C. C. R. 170.

(10-2) *In action for injuries to passenger, plaintiff's attorney stating to jury that value of plaintiff's time was not less than \$4,000 or \$5,000 a year.*

On the third trial of an action for injuries to passenger, plaintiff's attorney, after exclusion of evidence that plaintiff derived an income of about \$4,500 from his business, stated to the jury that the value of plaintiff's time, as matter of common knowledge, could not have been less than \$4,000 or \$5,000 a year. An objection was sustained. Held, that the erroneous statement was only addressed to the amount of damages, and as the amount was less than that awarded on the second trial, the error was harmless. *Flynn v. R. Co.*, 155 Ill. App. 494.

(p-2) *In action against brewing company for injuries from liquor, plaintiff's attorney saying there would be no hardship in a verdict against it, profits being big enough to stand it.*

In a suit under the Dram-Shop Act (Hurd's Revised Statutes 1909, chap. 43), sec. 9, against brewing company which owned the building, for injuries resulting from the sale of intoxicating liquors in the building, the attorney for plaintiff said, in his argument, that there would be no hardship in rendering a verdict against a brewery, that the law made it liable, and breweries expect to have to pay damages, and figure on paying damages in estimating their profits, and that the profits of the brewery business are big enough to stand it. Held that, as the remarks complained of would have had no effect as to enhancing the damages, and as no complaint is made of excessive damages in appellant's motion for a new trial, the court must assume that the damages were not excessive, and that the error was not prejudicial. *Eggers v. Hardwick*, 155 Ill. App. 254.

(q-2) *Counsel improperly pressing upon the jury's attention, that the Standard Oil Company was favored by railroads, etc.*

Where a counsel for the owner of property used in the storage and sale of oil, in his argument, in proceeding to fix its value, after taking by eminent domain, presses upon the jury's attention the fact that the Standard Oil Company was favored by the railroads, and was the only competitor of the owner in the wholesale oil trade, this is not prejudicial, since a reasonable latitude is allowed to counsel in presenting a case to a jury, and since the court can not judicially know that the name of the Standard Oil Co. is so odious in this state, that the mention of it would induce a jury to act in disregard of their oaths. *C. Co. v. True* (Wash. Sup.), 114 P. 515.

- (r-2) *In action against railroad company for personal injuries, counsel stating amount of plaintiff's claim, and jury charged to disregard same.*

In an action against a railroad company for personal injuries, where plaintiff's counsel, in summing up, stated the amount of plaintiff's claim, but immediately withdrew the remark, and asked that the jury be charged to disregard it, which was done, and the verdict was not unreasonable, damage therefrom to defendant could not be inferred, and the judge's refusal to withdraw a juror is not ground for reversal. *Brenisholtz v. R. Co.*, 229 Pa. 88, 78 A. 37.

- (s-2) *In action for the death of a servant, improper remarks of counsel intended to incite the sympathy of the jury.*

In an action for the death of a servant plaintiff's junior counsel, during his opening argument, twice made statements outside the record intended to excite the sympathy of the jury. On objection the court rebuked him, stating that the language was improper, and that there was no evidence on which to base it, but the jury at the time were not cautioned to disregard the remarks, nor was the court asked to withdraw the case from the jury. The remarks were fully replied to by defendant's counsel, and plaintiff's senior counsel distinctly stated in his argument that the plaintiff did not ask a verdict on the ground of sympathy, but that he rightfully depended entirely on proof of defendant's negligence, and the court charged that plaintiff, in order to recover, must prove her case by a fair preponderance of the evidence. Held, that the verdict returned not having been so large as to indicate that the jury were influenced by sympathy, defendant was not prejudiced by the attorney's misconduct. *Worden v. Gore-Machan Co.* (Conn. Sup.), 78 A. 422.

(t-2) *Statement by counsel that brakeman, who had been injured and was suing therefor, was placed in a baggage car with chickens, ducks, etc.*

Where, in an action for injuries to a brakeman, necessitating a journey in the baggage car to a hospital in a distant city, there was no evidence that chickens, ducks and geese were in the baggage car, the argument of counsel that the brakeman was placed in a baggage car along with such fowls, though improper, was not reversible. *R. Co. v. Rogers* (Ark. Sup.), 126 S. W. 375, 1199.

(u-2) *In insurance case, remark of counsel, "If Jesus Christ, the Son of God, should come to earth and take out an insurance policy, and His property was destroyed by fire," etc.*

Where, in an action on a fire policy, in which the principal issue was, whether plaintiff kept an iron safe in his store, and kept his books therein, as required by the policy, and the evidence showed that he kept the safe, but made it an issue of fact whether the books were kept there on the night of the fire, and the court required a finding for defendant, if they were not, remarks of the plaintiff's counsel in the opening argument, that, "If Jesus Christ, the Son of God, should come to earth and take out an insurance policy, and his property was destroyed by fire, these insurance companies would charge him with burning up his property," could not have prejudiced the defendant. *Insurance Co. v. Becton* (Tex. Civ. App.), 124 S. W. 474, writ of error den. (Tex. Sup.) 125 S. W. 883.

(v-2) *Remark of counsel, "How much would you take to be in the same condition as the plaintiff?"*

The appellate court will not reverse a judgment on a verdict for plaintiff, in an accident case, because the trial court refused to withdraw a juror and continue the case, after counsel for plaintiff had said to the jury, "How much

would you take' to be in the same condition as the plaintiff?" *Bonnelly v. Traction Co.*, 40 Pa. Super. Ct. 110.

(w-2) *Remark of counsel to jury not to allow their special findings to conflict with their general findings.*

Remark of counsel, asking the jury to be careful and not allow their special finding to conflict with their general finding was not prejudicial, where the special findings were all answered in accordance with the complaining party's views. *Crabtree v. R. Co.*, 86 Neb. 33, 124 N. W. 932.

(x-2) *Remark of counsel, that if the jury fixed the plaintiff's damages at too low a sum the court could not raise it.*

Where, in an action for injuries, plaintiff's right to recover was not doubtful, and there was nothing in the verdict to indicate that any portion of it was due to an improper statement of his counsel, "that if the jury fixed the plaintiff's damages at too low a sum the court could not raise it," such statement was not prejudicial, though the court, in reply to defendant's objection, only said that the jury had the right to fix the verdict. *Gibbs v. Poplar Bluff Light & Power Co.* (Mo. App.), 125 S. W. 840.

(y-2) *Counsel using inapt illustration in his argument to the jury.*

A judgment will not be reversed because plaintiff's attorney made use of what was alleged to be an "inapt illustration," in his argument to the jury. *Norman v. Shelt* (Mo. App.), 125 S. W. 527.

(z-2) *Plaintiff's counsel, in argument, said, "Plaintiff has testified for whom he has worked for the last five or six years, and if not true, railroad would have brought witnesses to contradict him."*

In an action by a railroad employee for injuries, plain-

tiff's attorney, in argument, stated that plaintiff has testified for whom he has worked for the last five or six years, and if he was not telling the truth the railroad would search for the men he worked for, and would have brought them here to contradict the plaintiff. Held that, while the remarks might have been improper, they were not sufficiently so to warrant a reversal. *R. Co. v. Browning* (Tex. Civ. App.), 118 S. W. 245.

(a-3) *Remark of counsel, that if witness for defendant had told the truth his job with it would not have lasted longer than a snowball in Yuma.*

Counsel remarked in argument, that if witness for defendant has told the truth, as to how the accident happened, his job with defendant would not have lasted longer than a snowball in Yuma. The court verbally instructed the jury at the time not to consider the language and defendant did not request a written instruction, and the verdict for plaintiff was not immoderate. Held, that the remark, though improper, was not so obviously prejudicial as to call for a reversal. *R. Co. v. Hart* (Tex. Civ. App.), 116 S. W. 415.

(b-3) *Remark by plaintiff's attorney in argument, "You will believe what this witness says, if all the railroad men in Christendom should swear the other way."*

In an action against a railroad, it is harmless error for the plaintiff's attorney to say, in his argument, in reference to the testimony of a witness, "You will believe what this witness M said, if all the railroad men in Christendom should swear the other way." As the remark was in substance merely that the jury would believe the witness as against a multitude of interested witnesses. *Beck v. R. Co.*, 156 Mich. 252, 120 N. W. 983, 16 D. L. N. 141.

(c-3) *Misconduct of plaintiff's counsel in argument, "We want no verdict based on prejudice. We want the same regard that prompted a fine of \$29,000,000 against another corporation."*

In his closing argument plaintiff's counsel said, "Counsel's contention that you can not find for plaintiff, unless your verdict is based on prejudice against railroad companies, is an insult to your integrity. We want no verdict based on prejudice. We want the same regard for law in this case as prompted another judge of this country to fine a corporation \$29,000,000." Held, that the argument was highly improper, but was not prejudicial, where the jury, in view of the reasonable verdict rendered, were evidently not influenced by it. *R. Co. v. Brown* (Ky. Ct. App.), 113 S. W. 465.

(d-3) *Counsel stating that defendant negligently violated city laws, and asking the jury if plaintiff was to go away empty-handed.*

In an action against a railway company for killing plaintiff's intestate, defendant's counsel admitted that the preponderance of evidence showed that the train was running faster than allowed by the city ordinances, and the evidence strongly tended to show that its speed was 15 to 25 miles an hour; while the limit under the ordinance was seven miles an hour. Plaintiff's counsel, in argument, stated that the evidence that defendant had negligently violated the city laws made for the protection of the public, and while the jury could send the plaintiff away from the court-house empty-handed, if they did so, they should put a sign above the door, that the defendant could violate the law with impunity, boast of the violation, and go forth from the temple of justice unharmed, unwhipped and unpunished. Its negligence was established, and the only evidence of contributory negligence was that showing persons near the

track, in a place habitually used by the public. The verdict was for \$6,000. Held, that though the language of the counsel was improper, defendant was not prejudiced thereby. *R. Co. v. Wall* (Tex. Civ. App.), 110 S. W. 453; *R. Co. v. Barnes* (Tex. Civ. App.), 111 S. W. 447.

(e-3) *Plaintiff's counsel, in action for wrongful death, stating that the law mentioned, like every other, was expanding and being made more sensible.*

In an action for the death of plaintiff's intestate by being run over by a street car, previous to the amendment of 1903, raising the limit of recovery, plaintiff's counsel, in his argument, stated this change to the jury, and, on objection made, a colloquy between counsel occurred, wherein plaintiff's counsel stated that the law mentioned, like every other law, was expanding and being made more sensible. Held, that though the allusion to the change of law was improper, counsel's remarks were not of such a prejudicial character as to require a reversal. *R. Co. v. Strong*, 230 Ill. 58, 82 N. E. 335, affm'g judgmt. 129 Ill. App. 511.

(f-3) *In a will contest, statement by proponent's counsel that he wished to refresh the recollection of a witness, that her recollection was not good.*

Where, in a will contest, a verdict was directed for proponent, a statement made by proponent's counsel, that he wished to refresh the recollection of a witness about certain things, and that her recollection was not good, though improper, was not prejudicial to contestant. *Walker v. Walker* (R. I. Sup.), 67 A. 519.

(g-3) *Plaintiff's counsel improperly stating that a certain instruction of the court did not apply to the facts in evidence.*

Where plaintiff's attorney, in his argument to the jury, stated that a certain instruction of the court did not apply

to the facts in evidence in the case, and the court, in overruling defendant's objection to the statement, explained that plaintiff's attorney meant that the instructions did not apply to the facts, because, as he asserted, the facts did not exist, the defendant was not prejudiced by the incident. *McArthur v. R. Co.*, 123 Mo. App. 503, 100 S. W. 62.

(h-3) *Improper exchange of remarks between counsel as to plaintiff's failure to call important witnesses in his behalf.*

Defendant's attorney commented on the absence of the husband of plaintiff's daughter and plaintiff's son, who were witnesses to certain transactions connected with plaintiff's injury, and who had not testified. In reply, plaintiff's counsel stated that they were poor people, and that since the action was commenced they had obtained lucrative positions with defendant city, and had asked him not to call them, unless it was necessary. Held, that such argument, though error, was not ground for reversal, where it apparently, in no way, affected the result. *Hammock v. City of Tacoma* (Wash. Sup.), 87 P. 924.

(i-3) *On motion for non-suit, statement by defendant's counsel, that if granted he would do his best to care for plaintiff and children.*

In an action for the death of a servant, the court announced that the motion for a non-suit would be denied, but subsequently, after the withdrawal of the jury, the motion was argued by both sides, and a non-suit granted. During the argument counsel for defendant stated, "If the court will sustain my motion now or hereafter, I shall do my best, and I promise, in the presence of my Maker, to take care of plaintiff and her children for the rest of their lives, and I have yet to have a recommendation in such a matter turned down at the office." Held, that though the remark was improper, it was not ground for reversal, the non-suit

having been proper on the evidence, and it not being presumable on appeal that the trial court had been influenced improperly by the remarks of counsel. *Brown v. R. Co.* (Wash. Sup.), 86 P. 1053.

(j-3) *Statement by counsel that an issue sought to be raised had been determined by two juries in favor of his client.*

Statement by counsel, before the jury, in argument with the court and opposing counsel as to the admissibility of evidence, that an issue sought to be raised by such evidence had been determined by two juries in favor of his client, was harmless, this having been repeatedly and emphatically denied by the court and opposing counsel, such issue not having been submitted to the jury, and the evidence having been ample to justify their verdict on the issues submitted to them. *Meyer Bros. Drug Co. v. Madden, Graham & Co.* (Tex. Civ. App.), 99 S. W. 723.

(k-3) *Statement by counsel that defendant had not the least semblance of moral sense, but would steal plaintiff's property.*

Defendant was not prejudiced by argument of counsel, stating that he had not the least semblance of moral sense, but would steal plaintiff's property, where the undisputed evidence showed that defendant converted plaintiff's property, and the verdict was not in excess of its reasonable value. (Tex. Civ. App.), *Crow v. Ball*, 99 S. W. 583.

(l-3) *Misconduct of counsel, in action for injuries from a collision, in stating the railroad company was guilty of wrongful conduct.*

Plaintiff, a street-car operator, was injured in a collision at a crossing between the street car and a train belonging to defendant railroad company, consisting of an engine and certain cars pushed in front thereof at a high rate of speed,

before daylight, and without any sufficient light on the end thereof. The attorney for the traction company, in a suit against both it and the railroad company, was guilty of misconduct in repeatedly endeavoring to bring out the fact that conductors of the railroad company had quit its service, or threatened to do so, because of their being required to push box-cars in front of engines going over the crossing in question, after the court had held such evidence inadmissible. Held, that such method of handling cars at the place in question was so obviously negligent that the railroad company was not prejudiced by the insinuation. *R. Co. v. Knowles* (Tex. Civ. App.), 99 S. W. 867.

(m-3) *In an action for personal injuries, statement of counsel, that if they thought plaintiff was a fraud, they should, by their verdict, throw him and his family on the charities of the world.*

In an action for personal injuries, from which there was evidence that death of the plaintiff might result, a statement of counsel to the jury, that if they thought plaintiff was a fraud, and that there was no evidence backing him, they should, by their verdict, throw him and his wife and children on the charities of the world, though improper, was not ground for reversal. *Wells-Fargo Exp. Co. v. Boyle* (Tex. Civ. App.), 98 S. W. 441, Judgm't rev. o. o. g. 102 S. W. 107.

(n-3) *In action for injury from defective trestle, counsel stating that "it is immaterial how long before the trestle fell, stringers were removed," etc.*

The argument of plaintiff's counsel, in an action for injury to a servant by reason of the master's superintendent causing stringers to be pulled from a trestle while plaintiff was dismantling it, that "it is immaterial how long before the trestle fell the stringers were removed, if you believe . . . the removing . . . was the cause of the trestle falling,

and that they were removed while plaintiff was on the trestle at work, without his knowledge," while not an accurate statement of plaintiff's case, yet being within the latitude of argument, and in reply to opposing counsel, and not appearing to be prejudicial, the case being correctly stated in the instructions, is not ground for reversal. *Grayson-McLeod Lumber Co. v. Carter* (Ark. Sup.), 98 S. W. 699.

(o-3) *Counsel calling defendant's engine an "old fire trap."*

Where, in an action for the destruction of plaintiff's dwelling house by fire from defendant's engine, defendant contended that the fire was the result of a defective chimney, and was not caused by defendant's engine, the fact that plaintiff's counsel in his argument referred to the engine as an "old fire trap," and the court, on objection thereto, stated that he thought the remark not objectionable, that counsel had a right to call them "fire traps," did not constitute prejudicial error. *Enix v. R. Co.*, 111 Iowa 748, 83 N. W. 805.

(p-3) *In action for injury to a servant, statement by counsel, that a surety company stands back of defendant.*

In action by a servant for injuries, a remark of plaintiff's counsel that a surety company stands back of defendant, made in the presence of the jury, in an argument, on an objection to defendant's proposal that plaintiff be required to submit to a physical examination, though improper, was not prejudicial error. *Wankowski v. Crivitz Pulp Paper Co.* (Wis. Sup.), 118 N. W. 643. Seeking to have the jury know that defendant carried casualty insurance to indemnify him, *Eldorado Coal & Coke Co. v. Swan*, 227 Ill. 586, 81 N. E. 691, affirming judgment, 128 Ill. App. 237. Alluding to an insurance company as interested in the defense, *Savage v. Hayes Bros. Co.*, 142 Ill. App. 316.

Sec. 126. Misconduct of jury.

- (a) *To set aside verdict, misconduct of jury must have been gross and resulted in injury to complaining party.*

A verdict on account of the misconduct of the jury will not be set aside, unless it appear that such misconduct was gross, and resulted in a palpable injury to the party complaining. *De Hart v. Etnire*, 121 Ind. 242, 23 N. E. 77.

- (b) *In action for death of servant from fall of gate, removal by the jury of a plug belonging thereto.*

Where, on a former trial of an action for the death of a servant caused by the falling of a defective gate, a plug, a part of the gate, which had been brought into court had been removed by the jury, but was identified on a second trial, such removal of the plug was not ground for reversal of a judgment in favor of plaintiff on the second trial. *Storrie v. Grand Trunk Elevator Co.*, 134 Mich. 297, 10 D. L. N. 454, 96 N. W. 569.

- (c) *Jurors taking dinner at plaintiff's house.*

The mere fact that two of the jurors, in an action in a justice's court, had taken dinner at recess at plaintiff's house, it appearing that nothing was said or done in their hearing to influence their decision, will not necessarily call for a new trial in the case, where the verdict is fully supported by the evidence. *Johnson v. Loveless*, 18 Weekly Dig. (N. Y.) 49.

- (d) *Jurors reading newspapers during the argument of counsel, and not hearing or reading the instructions given.*

The fact that the jurors were reading newspapers during the trial and while defendant's counsel were making their speeches, and did not, after retiring, read or hear read in-

structions given, is not ground for reversal, where the court below refused to set aside the verdict on a motion based on the same grounds. *Langworthy v. Myers*, 4 Iowa 18.

(e) *Irregular conduct of jury in examining character of soil, aside from the evidence.*

Testimony was given for defendants that holes had been dug along a street, and that the soil disclosed no indication of sand. A view was granted, and the jury found a laborer filling the last of the holes, but, on a suggestion from one of the jurymen, he dug another hole, in which the jury noticed the character of the soil. There was no denial of the testimony of defendant's witnesses, that there was no indication of sand in the soil. Held that, though the conduct of the jury was irregular, defendants were not prejudiced thereby. *Wood v. Moulton*, 146 Cal. 317, 80 P. 92.

(f) *Pleadings improperly taken to the jury room.*

If, from an inspection of the record, it is apparent that the jury were not confused by the pleadings which the court permitted them to take, in connection with the instructions, a judgment on the verdict will not be set aside. *Redinger v. Jones*, 68 Kan. 627, 75 P. 997. Jury improperly taking papers, *Avery v. Moore*, 133 Ill. 74.

(g) *Foreman of jury reporting inability to agree, saying they were a stubborn lot of men.*

In a personal injury case the jury were called in by the court after they had been out for awhile and asked if they had reached a verdict. In response to this question the foreman answered, that they had been unable to agree, and that he was ashamed of them, for they were a stubborn lot of men. This caused laughter among the bystanders, and from which it was naturally inferable that the remarks were made in a jocular manner. Held, to have been harm-

less error. *Atkins v. R. Co.*, 152 Mo. App. 291, 132 S. W. 1186.

(h) *Jury wrongfully taking original instead of a copy of instrument to jury room.*

Where the jury, being entitled to take with them a copy of an instrument omitted in the pleading, the signature of which was admitted, wrongfully took the original instrument, which had been introduced in evidence. Held, that the error was without prejudice. *Bank v. Brewer*, 100 Iowa 576.

(i) *Misconduct of jurors in going to a saloon and drinking after the case had been submitted to them.*

Misconduct of jurors in going to a saloon and drinking after the case had been submitted to them, held not to require a reversal. *Reed v. R. Co.*, 151 N. W. 936.

Sec. 127. Misconduct of the parties.

(a) *During the testimony of defendant plaintiff called her a liar and said that she had lied.*

That during the testimony of defendant, and the argument of her counsel, plaintiff called defendant a liar and said that she had lied, is not ground for a reversal of the judgment for plaintiff, where injury to defendant is not clearly shown. *Hall v. Mooring* (Ga. App.), 76 S. E. 759.

(b) *Purchase by the defendants of wines, etc., for the jury.*

Affidavits that the defendants, during the pendency of the trial, purchased wines and other liquors for the jury, which the jury drank after they had returned their verdict, constituted no ground for the reversal of a judgment in favor of the defendant. *Jarnigan v. Mairs*, 1 *Humphreys* (Tenn.) 473.

- (c) *In an action for injuries, plaintiff testifying that he was married.*

Where, in an action by a minor for injuries, witnesses on both sides, without objection, referred to the fact that plaintiff was a married man; the fact that he was permitted to testify that he was a married man does not constitute reversible error. *Chambers v. Chester*, 172 Mo. 461, 72 S. W. 904.

Sec. 128. Reading unconstitutional law to the jury.

- (a) *Reading of unconstitutional law uninfluencing decision.*

Allowing an unconstitutional law to be read to the jury during the trial is harmless error, where the record in the case shows that whatever opinion the court may have entertained about the law, it had no influence on the decision. *Boggs v. Caldwell Co.*, 28 Mo. 586.

Sec. 129. Releases.

- (a) *On a plea of release, refusal to allow defendant to close the argument.*

In an action by A against B, on a claim for wages, B pleaded a release, and requested that he be allowed to close the argument to the jury, alleging that the plea was one of payment simply. The request was erroneously refused, and the refusal was assigned as error. Assignment overruled. *Staub v. Wolfe*, 4 Pennypacker (Pa.) 280.

- (b) *Instruction that from the evidence a sufficient tender of the consideration received for the release had been made.*

Where, in an action for injuries to a servant, the question of accord and satisfaction as pleaded was not proved, an instruction submitting to the jury to determine whether or

not fraud had been practiced on plaintiff in securing his signature to a release, and charging that from the evidence a sufficient tender of the consideration received by him had been made, was more favorable to defendant than he was entitled to, and defendant can not be heard to complain of it on appeal. *Brockmiller v. Industrial Works*, 148 Mich. 642, 14 D. L. N. 336, 112 N. W. 688.

(c) *In a servant's action for injuries, admitting evidence of a release not pleaded.*

In a servant's action for injuries, error in admitting in evidence a release not pleaded, was harmless, where the release was first properly admitted in cross-examination of plaintiff, as affecting his credibility, and on re-direct examination plaintiff explained the circumstances attending its execution, making no claim of fraud or duress, and assigning as a sole reason for its execution the fact that he desired re-employment, and could not get it without executing the release. *Tindall v. R. Co.*, (Wash Sup.), 107 P. 1045.

(d) *Refusal to charge that it was necessary for plaintiff to prove tender of the money received for the release.*

Where, in an action for personal injuries, defendant relied on plaintiff's execution of a release of her claim for damages, and the evidence showed that the amount paid in consideration of the release was tendered back to defendant within a day or two after the execution of the release, and that the tender was kept good by bringing the money into court when the suit was brought, the omission of the court to state, in its instructions, that it was necessary to justify a verdict for plaintiff that the tender of the money received by her on executing the release should be proved, was harmless. *Ind. Traction & Terminal Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872.

Sec. 130. Tortfeasors.

- (a) *Instruction failing to discriminate between joint tortfeasors.*

Where defendants, if liable at all, are liable as joint tortfeasors, the fact that the trial court refused to state the law as favorable to one joint tortfeasor as to the other, can not be alleged as a ground for a reversal of the judgment in favor of plaintiff. *Deming v. R. Co.*, 49 App. Div. 493, 97 St. Rep. 615, 63 N. Y. Supp. 615, affm'd, 169 N. Y. 1.

- (b) *Code modifying the common law rule in regard to joint judgment against several joint tortfeasors.*

The common law rule that a reversal of a joint judgment against several joint tortfeasors for error against one necessitates a reversal as to all, has been modified by the Code of Civil Procedure, secs. 578, 579. *Clark v. Van Torchiana* (Cal. App.), 127 P. 831.

Sec. 131. Waivers.

- (a) *Where part only relevant, waiver by consenting to admission of the entire document.*

If part of a public document offered in evidence is admitted on plaintiff's assenting to its admission, that all or none should go in, it is not error to permit the whole to be read, though part is irrelevant. *Serviss v. Stockstill*, 30 O. S. 418.

- (b) *Waiver of iron safe clause in insurance policy.*

Error, if any, in allowing a hypothetical question to an expert, as to whether an iron safe clause in a fire policy was material to the risk was harmless, where the jury found that the clause was waived. *S. E. Hanna & Co. v. Insurance Co.* (Mo. Sup.), 82 S. W. 1115.

(c) *Error in refusing evidence of waiver of protest.*

In an action on a note, any error in refusing to admit evidence to show a waiver by defendants of notice of protest was harmless, where a demurrer to the evidence as to some of the notes was sustained, on the ground that they show that they were non-negotiable, and as to the other note, on the ground that the certificate of protest was insufficient to show that the note was, in fact, protested. *Stix v. Matthews*, 75 Mo. 96.

(d) *Refusal to instruct for defendant, followed by evidence, and neglect to renew motion, a waiver.*

An exception to the refusal to instruct the jury to find for the defendant, is waived if the defendant puts in evidence which may have an important bearing on the case, and does not renew the motion. *R. Co. v. Callighan*, 161 U. S. 91, 40 L. ed. 628.

(e) *Conflicting instruction as to waiver in insurance policy where evidence tends not to show any.*

Conflicting instructions as to what would constitute a waiver of the conditions in an insurance policy will not require the reversal of a judgment in favor of the insurer for breach of conditions, if the evidence all tends to show that there was no waiver. *Dale v. Insurance Co.*, 95 Tenn. 38, 31 S. W. 266.

(f) *Failure to charge what would constitute waiver of forfeiture.*

The failure of the court, in an action on an insurance policy, to state to the jury what facts would constitute a waiver of forfeiture, and permitting them to find it as a matter of fact from insufficient evidence, is error without prejudice. *Towle v. Insurance Co.*, 91 Mich. 219, 51 N. W. 987. Waiver of error by failure to ask instruction on

omitted point, *Deboard v. Brooks*, 28 Ga. 362. By trying cause on justice's transcript, *Hallam v. Jacks*, 11 O. S. 692. By trying on the merits, *Kershaw v. Snowden*, 36 O. S. 181. By judgment, by consent, *Jackson v. Jackson*, 16 O. S. 163. By mortgagor accepting surplus, *Dreyer v. Bigney*, 98 Dec. Repr. 562 (O.), 9 Bull. 15.

(g) *Waiver as to time for filing brief.*

Where the appellee, upon the filing by the appellant of his brief, after expiration of the regular time, moves for an enlargement of time for filing, he waives his right to a judgment of affirmance, under the rule. *Yates v. Thompson*, 44 Ill. App. 145.

(h) *Question of waiver of an estoppel.*

Where the court left the question of waiver of an estoppel to the jury, when it should have decided it as a matter of law, that there was no estoppel, but the jury found the estoppel was waived, the judgment will not be reversed. *Burnell v. Maloney*, 39 Vt. 579, 94 Am. Dec. 358.

Sec. 132. Withdrawals.

(a) *Error in admitting improper evidence cured by withdrawal and instruction to disregard it.*

The general rule is, that if inadmissible evidence has been received during a trial, the error is cured by its subsequent withdrawal before the trial closes, and by an instruction to disregard it. (Me.) *Armour & Co. v. Kellmeyer*, 161 F. 78, 88 C. C. A. 242, 16 L. R. A. n. s. 1110; *Baker v. Joseph*, 16 Cal. 173; *Ward v. Preston*, 23 Cal. 469; *More's Est.*, 121 Cal. 609, 54 P. 97; *Bank v. Allen*, 6 Col. 594; *R. Co. v. Montgomery*, 17 Ky. L. R. 807, 32 S. W. 738; *R. Co. v. Mattingly*, 22 Ky. L. R. 489, 57 S. W. 620; *R. Co. v. Mulfinger's Adm'x*, 26 Ky. L. R. 3, 80 S. W. 499; *Sparr v. Wellman*, 11 Mo. 230; *Logan v. Metropolitan St. R. Co.*,

183 Mo. 582; *Winters v. R. Co.*, 39 Mo. 468; *Wills v. R. Co.*, 44 Mo. App. 51; *Larimore v. R. Co.*, 65 Mo. App. 167; *Town of Randolph, v. Town of Woodstock*, 35 Vt. 291; *P. S. I. Co. v. Worthington*, 2 Wash. Ter. 472.

(b) *Instruction withdrawing improper evidence from the jury.*

The error in admitting evidence is cured by an instruction which withdraws all such evidence from the jury. *Heberling v. City of Warrensburg*, 133 Mo. App. 544, 113 S. W. 673; *Counday v. U. S. Rys. Co. v. St. Louis*, 134 Mo. App. 282, 114 S. W. 88.

(c) *Incompetent evidence cured by withdrawing the account.*

Where a party is permitted to give incompetent testimony to support an account, and afterwards, becoming satisfied that the evidence is insufficient or inadmissible, withdraws the account, the error in admitting the assistant proof is cured. *Strawbridge v. Spann*, 8 Ala. (820) 608; *Schmidt v. Demple*, 7 Kan. App. 811, 52 P. 906.

(d) *In action to recover for injuries, improper testimony of plaintiff, that she asked the conductor, "Why did you start the car?" and he replied, "That motorman is so frisky he won't stand still," cured by withdrawal.*

Plaintiff, while attempting to alight from a street-car, was injured by the sudden starting of the car which threw her to the ground. In an action to recover for her injuries plaintiff testified that she asked the conductor, "Why did you start the car up?" and that he replied, "That frisky motorman is so frisky he won't stand still long enough." The court withdrew the testimony from the consideration of the jury. Held, that the withdrawal cured the error in admitting it; as the evidence was not of such a character as

to make it reasonably probable that its effect would survive a warning not to consider it, and there was nothing to suggest a design to influence the mind of the jury by getting in improper evidence of a prejudicial nature. *Peck v. Springfield Traction Co.*, 131 Mo. App. 134, 110 S. W. 659.

(e) *Admission of erroneous testimony unimportant, if a juror be withdrawn and judgment rendered by the court by consent.*

Admission of erroneous testimony before a jury is of no moment, if a juror is withdrawn and judgment rendered by the court by consent. *Wells v. Martin*, 1 O. S. 386.

(f) *Withdrawing juror and continuing not usually reviewable.*

An exercise of the discretion of the court to grant leave to withdraw a juror, and that the cause may go over to another term, will not be tried on error unless the discretion is abused. *Schofield v. Settle*, 31 Ill. 515.

(g) *Erroneous objection to witness as incompetent subsequently withdrawn.*

On the trial of an action by A against B, a witness introduced on behalf of A was erroneously rejected by the court as incompetent. Subsequently B, in the course of the trial, withdrew his objection to the witness testifying on behalf of A, and A voluntarily declined examining him. To a judgment for A, B assigned for error the rejection of the witness. Judgment affirmed. *Small v. Jones*, 6 Watts & S. (Pa.) 122.

(h) *Improperly limiting number of witnesses not error, where afterwards withdrawn.*

It is no ground of error that the court improperly limited the number of witnesses to be called about a certain point, where a greater number were afterward called, and as many

as were called were allowed to testify. R. Co. v. Treat, 75 Ill. App. 327.

(i) *Improper remarks of counsel which were compelled by the court to be withdrawn.*

The court will not reverse because of improper remarks in argument to the jury, where the court below sustained objections thereto, using language calculated, not only to counteract the effect of the remarks, but to compel their withdrawal, and no instructions were requested further to neutralize their effect. R. Co. v. Waniatta, 169 Ill. 17; R. Co. v. Gillett (Tex. Civ. App.), 99 S. W. 712.

(k) *Refusal to permit defendant to withdraw counterclaim was not prejudicial.*

Where a counterclaim sets up matter entirely distinct from plaintiff's cause of action, and no evidence is offered with respect to such counterclaim, and a verdict is directed, which does not purport to and could not conclude defendant in a future action on such counterclaim, defendant is not prejudiced by a refusal of the court to permit him to withdraw such counterclaim. Guggenheim v. Kirchhofer (N. Y.), 66 Fed. 755, 14 C. C. A. 72.

(l) *Where declaration consists of several counts, refusal of court to withdraw defective ones not reversible error.*

Where a declaration consists of more than one count, and some of them fail to state a cause of action or are unsupported by the evidence, the court should, upon request, withdraw the defective or unsupported counts, but its refusal to do so is not reversible error, where there are other proven counts in the declaration sufficient to sustain a verdict, Pract. Act, 1907, sec. 78 (Laws 1907, p. 459), providing that when an entire verdict should be given on several counts, it shall not be reversed because of any defective count, if

one or more of the counts be sufficient to sustain the verdict. *Klofski v. R. Supply Co.*, 235 Ill. 146, 85 N. E. 274, affm'g judg. *R. Supply Co. v. Klofski*, 138 Ill. App. 468.

(m) *Court withdrawing one plaintiff and adding several defendants was harmless.*

Feigned issue directed by the Register's court between A and B, plaintiffs, and C as defendant, to try the validity of a will. On petition of A, the court withdrew his name, and on petition of several legatees who opposed the will, their names were added as defendants. On error, held that though the changes were beyond the power of the common pleas, yet as no harm appeared to have been done by the error, judgment would not be reversed. *Dotts v. Fetzer*, 9 Pa. 88.

(n) *Where court withdraws from the jury certain defenses relied upon, this cures error in admitting evidence in support thereof.*

Where the court, by its general charge, wholly withdraws from the jury certain defenses relied upon by defendant in ejection, any error in admitting evidence in support of such defenses is cured. *Verdery v. R. Co.*, 82 Ga. 675, 9 S. E. 1133; *Miles v. Stevens*, 3 Pa. St. (3 Barr) 21, 45 Am. Dec. 621; *Armstrong v. Noble*, 55 Vt. 428.

(o) *Withdrawal by court of part of charge objected to.*

When the trial court's attention was called to a portion of the charge, he stated, "I withdraw that and submit the question," stating the issue. Held, that this was a sufficient withdrawal of the matter objected to, and the statement following might be treated as merely explanatory of what was intended in the original charge. *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N. Y. 486, affm'g 16 App. Div. 141, 79 St. Rep. 111, 45 N. Y. Supp. 111.

(p) *Objectionable defense cured by withdrawal from the consideration of the jury.*

Where several defenses are stated in an answer, and the court permits one of them to be amended over the objection of the plaintiff after the trial has commenced, and the plaintiff immediately demurs to the answer as amended, and requests a ruling thereon before the trial proceeds, which is denied, and the court, while holding its decision in abeyance, compels the party to proceed with the trial, this court will not consider whether the court committed error or not in these rulings and orders, when it appears that the defense objected to was withdrawn from the consideration of the jury before the conclusion of the trial. *Minneapolis Threshing Machine Co. v. Currey*, 75 Kan. 363, 89 P. 688.

(q) *Wrongfully withdrawing instructions as to exemplary damages benefited defendant.*

A trial court, after instructing the jury that they might allow exemplary damage, recalled the jury and erroneously withdrew the instruction, but denied defendant's application for leave thereupon to further address the jury; held, that defendant being benefited thereby had no ground of complaint. *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 13 P. 609, 59 Am. Rép. 571.

(r) *Refusal of the court to withdraw case under the third count was without prejudice.*

Where a declaration contains three counts, and there is a variance between the one described in the third count and the one proved, but the first two counts are sufficient, a refusal by the court to withdraw all consideration of the case under the third count does not prejudice defendant. *Roberts v. Hawkins*, 70 Mich. 566, 38 N. W. 575.

(s) *Agreement withdrawing interplea was harmless.*

After the trial of an action in which an interplea was filed to before the judgment, the person filing the interplea executed and delivered to her attorney a paper authorizing him to withdraw the interplea and allow judgment to go against her, and on the same day her attorney and the attorney for plaintiff signed a stipulation for judgment in favor of plaintiff. The court, on appeal, held that the interplea was premature, and the case was remanded and the interplea was dismissed, and another one filed. Held that, on the second trial, the first paper was competent as an admission that the claim of the interplea was invalid, but the admission of the stipulation, though error, was harmless. *F. O. Swayer Paper Co. v. Luney*, 68 Mo. App. 1.

(t) *Irregularity in placing copy of instructions given at defendant's request in the hands of the jury, and court, on discovery, withdrawing the same.*

The court inadvertently gave to a retiring jury a copy of instructions given at defendant's request, and did not discover the mistake until the jury had been out twelve hours, when he immediately informed the counsel, and the jury were recalled and the copy taken from their possession, with instructions to give all instructions equal weight with it, and the jury, after deliberating three hours, returned a verdict for defendant. Held that, as there was no misconduct, but merely an irregularity, and as it did not appear whether or not the jury had read the instructions, the verdict would not be set aside. *Jones v. Austin*, 26 Ind. App. 399, 59 N. E. 1082.

CHAPTER VII.

INTERROGATORIES AND INSTRUCTIONS TO THE JURY.

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Sec. 133. Abstract instructions.

(a) *Erroneous to charge upon abstract theories.*

In the absence of all proof, it is error, though not necessarily reversible error, to charge upon abstract theories. "Very few verdicts," this court has stated, "would stand, if the vague generalities which trial judges feel it their duty to indulge in, so as to cover every pos-

sible view which might have been presented in the argument of counsel, were treated as fatal, because there were no facts in evidence to sustain them." R. Co. v. Duffield, 12 Lea. (Tenn.) 63, 74; Southern Oil Works v. Bickford, 14 Lea. (Tenn.) 650; Burton v. Boyd, 7 Kan. 17; Lebus v. Robbins, 8 Ky. L. R. (abst.) 966; State v. Houser, 28 Mo. 233; George v. R. Co., 57 Mo. App. 358; R. Co. v. Ball, 9 Barb. (N. Y.) 271; Lyon v. Marshall, 11 Barb. 241.

(b) *Erroneous instruction on an abstract question will not reverse.*

If an instruction given by the court on an abstract question is erroneous, the appellate court will not reverse the judgment of the court below on that account, if it appears that no injury could have resulted to the plaintiff in error from such erroneous instructions; but if such erroneous instruction was calculated to mislead the jury to the injury of the plaintiff in error, the appellate court will reverse the judgment and award a new trial. Shepard v. Insurance Co., 21 W. Va. 368; Bank v. Eureka Co., 108 Ala. 89, 18 S. 600; Fleming v. Lunsford (Ala. Sup.), 50 S. 921; R. Co. v. Walker (Ark. Sup.), 125 S. W. 135; Procter v. Hart, 5 Fla. 465; Corbin v. Shearer, 3 Gilm. (Minn.) 482; Pate v. People, 3 Gilm. (Minn.) 644; Ten Eyck v. Harris, 47 Ill. 268; Swigert v. Hawley, 140 Ill. 186; Frank v. Traction Co. (W. Va. Sup.), 83 S. E. 1009.

(c) *Abstract instruction cured by other instructions.*

The giving of an abstract instruction is not ground for reversal, where the instructions, when read together, could not have worked prejudicially to the party complaining. Wellman v. R. Co., 219 Mo. 126, 118 S. W. 31.

- (d) *Abstract charge as to alleged rights in street which could not have misled the jury.*

In an action by appellee to recover damages alleged to have been caused to his property by the construction and operation of a railroad over an alley, on which appellee's property abutted, an instruction that the owners of lots have an interest in the streets appurtenant thereto, and that such right is such property as the lots themselves, was abstract, and could not have misled the jury. *R. Co. v. Walton*, 9 Ky. L. R. (abst.) 243.

- (e) *Abstract instructions disapproved, but failed to mislead the jury.*

The giving of abstract instructions should be avoided, when it is possible to do so, because they are sometimes misleading, but to be ground for reversal it must affirmatively appear that they were misleading. *Floralta Saw Mill Co. v. Smith*, 55 Fla. 447.

Sec. 134. Asking an excessive number of special charges.

- (a) *Asking an excessive number of special charges.*

A judgment will not be reversed for the failure to give a proper instruction where, though the case was simple, the party asked the court to give thirty-six separate instructions, many of them of unusual length. *Ry. Co. v. Wilson*, 77 Ill. App. 603; *Packing Co. v. Conkle*, 80 O. S. 117.

Sec. 135. Charge authorizing verdict by less than unanimous jury.

- (a) *Instruction that nine of twelve jurors could render a verdict.*

An instruction that nine of twelve jurors could render a verdict, even if erroneous, was harmless, where the

verdict rendered was unanimous. *Lolimeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S. W. 1108.

Sec. 136. Charge correct as a whole.

- (a) *In construing a charge to the jury each instruction should be considered in connection with the entire charge.*

In construing a charge to the jury each instruction is to be considered in connection with the entire charge, and if, considering the charge as a whole, the supreme court is satisfied the jury were not improperly advised as to any material point in the case, and that, reading each instruction in connection with the others, they were not misleading, the judgment will not be reversed on the ground of erroneous charge. *Finerty v. Fritz*, 6 Col. 136; *Denver Tramway Co. v. Reed*, 4 Col. App. 500, 36 P. 557; *Thatcher v. Rockwell*, 4 Col. 375; *McClelland v. Varns*, 5 Col. 390; *Colemay v. Davis*, 13 Col. 98, 21 P. 1018; *Brooks v. Crosby*, 22 Cal. 22, 11 Ga. 338; *Farmer v. Emmigs*, 53 Ill. App. 220; *Greene v. Greene*, 145 Ill. 264; *Partlow v. R. Co.*, 51 Ill. App. 597, *affm'd*, 150 Ill. 321; *Union Traction Co. v. Pfeil*, 39 Ind. App. 51, 78 N. E. 1052; *Lower v. Marceline Coal & Mining Co.*, 142 Mo. App. 351, 126 S. W. 987; *Clack v. Southern Electric Supply Co.*, 72 Mo. App. 506; *Spencer v. Tozer*, 15 Minn. 146 (Gil. 112); *Warner v. Lockerby*, 31 Minn. 421, 18 N. W. 145, 821; *Clark v. Thomas*, 4 Heiskel (Tenn.) 419; *R. Co. v. Spencer*, 93 Tenn. 173, 23 S. W. 211.

- (b) *That an instruction is argumentative is not reversible error, where instructions, as a whole, properly advised the jury.*

Argumentative instructions should not be given, but the fact that the instruction is argumentative is not reversible error, where the instructions, considered as a

whole, properly advised the jury as to the material issues in the case. *McCormick v. Parriott*, 33 Col. 382, 80 P. 1044.

- (c) *Instruction partially covering cured by another wholly and properly presenting the law.*

Where an instruction states the law correctly on the point it purports to cover, an omission therein is not ground of error where, in that instruction, with others, also agreed on the points which they embraced, the whole law on the subject is clearly and correctly stated. *R. Co. v. Warner*, 123 Ill. 38.

- (d) *If charge, considered as a whole, is free from the objections urged, the exception to a part can not be sustained.*

It is an established rule of this court that a general exception to a charge will not be good, if the charge contains a single correct proposition of law applicable to the case; and, also, that an exception to a portion of the charge must be considered in connection with the remainder on the same subject, and, if the charge taken as an entirety, is free from the objections urged, the exception to a part can not be sustained. *Mayer Bros. v. Wilkins*, 37 Fla. 244.

Sec. 137. Charge correcting error in refusing to strike from pleadings.

- (a) *Charge cured error in refusing to strike out certain words from the complaint.*

A charge, in an action for slander, directing the jury that certain words set out in the complaint as grounds for the action are not actionable, and operated to cure a prior erroneous refusal to strike out such words from the complaint. *Porter v. Choen*, 60 Ind. 338.

- (b) *Failure to charge as to unnecessary paragraph of complaint.*

Though, in a personal injury action, the first paragraph of the complaint charged that one C acted for defendant in employing the firm for which plaintiff worked, while the second paragraph averred that one S so acted, but the parties stipulated that S employed the firm, it would be assumed that the jury was controlled by the stipulation, which was introduced as evidence, and did not regard the first paragraph of the complaint, and hence, defendant was not harmed by the court's refusal to charge that plaintiff failed to prove a necessary allegation in the first paragraph, and that, therefore, such paragraph was withdrawn. *Winona Tech. Institute at Indianapolis v. Stolte (Ind.)*, 89 N. E. 393.

Sec. 138. Charge correct on controlling question, other errors unimportant.

- (a) *Charge correct on controlling question, other errors immaterial.*

A correct charge on the controlling question makes other errors ineffectual to affect the verdict. *Davis v. State*, 33 Ga. 98.

- (b) *Erroneous instruction not affecting the controlling question.*

A judgment will not be reversed because of an erroneous instruction given by the court, when the controlling question in the case was fairly left to the jury and correctly decided by them. *Bondurant v. Crawford*, 22 Iowa 40.

Sec. 139. Charge embodying opinion by the court.

- (a) *Charge embodying opinion by the court.*

In an action for conversion the court charged that

there was no material difference between the valuation of the property by witnesses, that the court had figured up the amount of the valuations, and that they amounted to a certain sum, etc. Held, that though the charge expressed the opinion formed by the court, yet the appellant, not having been prejudiced thereby, there was no ground for reversal. *Derby v. Gallup*, 5 Minn. 119 (Gil.) 85.

Sec. 140. Charge lacking fullness.

- (a) *Correct charge lacking fullness will not be held objectionable, where the defect was corrected by other charges.*

A charge of the court to the jury, correct as far as it goes, but wanting in fullness, will not be held objectionable in this court, where it appears that the defect was afterwards cured by instructions given to the jury at the request of counsel. *Montgomery v. Knox*, 23 Fla. 595.

- (b) *Incomplete instruction not ground for reversal.*

Giving an incomplete instruction is not ground for reversal, where it neither misled the jury nor prejudiced the rights of the complaining party. *Kaufman v. Bassmeier* (Okla. Sup.), 105 P. 326.

Sec. 141. Charge not injurious when verdict given on another ground.

- (a) *Charge did not injure when verdict was given on another ground.*

Where, in an action on notes and to enforce a vendor's lien, it appeared that the jury found for defendants, on the ground that the notes had been paid, and not on the ground that one of the defendants had executed the notes as surety, plaintiff was not injured by an instruction directing the jury that, if they found that such defendant

executed the notes as surety, to find for defendants. *Moore v. Lunn*, 79 Ind. 299.

(b) *Erroneous instruction uninfluencing verdict.*

Error in the giving of an instruction will be without prejudice, where it appears that the jury have made such a finding that such instruction can have had no influence upon the result. *Keyser v. R. Co.*, 61 Iowa 175; *Lathrop v. R. Co.*, 69 Iowa 105.

Sec. 142. Charge on neglect to charge on matter of common knowledge.

(a) *Instruction that jury may consider liability of wooden structures to get out of order was on a matter of common knowledge.*

Instruction to the jury that they may consider the liability of all wooden structures to get out of repair and unfit for use, which is a matter of common knowledge and can not be prejudicial. *Dyas v. Southern Pac. Co.*, 140 Cal. 296, 73 P. 972.

(b) *Neglect to instruct on commonplace matter.*

Jurors may be assumed to have ordinary intelligence and good sense, and neglect to instruct them on a commonplace matter is not ground for reversal, when no erroneous instruction on the subject has been given. *Davis v. McNear*, 101 Cal. 606, 36 P. 105.

Sec. 143. Charge on the use of annuity tables.

(a) *Charge on the use of annuity tables in calculating damages.*

A charge that the jury could use annuity tables in calculating damages, if erroneous, was rendered harmless by a finding that plaintiff was not entitled to recover. *Jackson v. R. Co.*, 7 Ga. App. 644, 67 S. E. 898; *R. Co. v. Day*, 91 Ga. 676.

Sec. 144. Charge that could not mislead the jury.

- (a) *Instruction, however erroneous, could not have misled the jury to find for plaintiff.*

In an action on a check given for a horse, in which the defense was breach of warranty, the court instructed that the mere expression of opinion of soundness did not constitute a warranty, unless so understood by the parties, and solely relied on by defendant, but the instruction did not direct a verdict for plaintiff if the warranty was not solely relied upon by defendant, being intended as applicable to defendant's claim that he did not examine plaintiff's mare, because plaintiff had warranted its soundness, but he relied upon the warranty solely. The evidence as to the warranty was conflicting. The only instruction requested by defendant submitted his theory of the case. Held, that any error in the instructions could not have misled the jury into finding for plaintiff. *Overstreet v. Street*, 154 Mo. App. 546, 136 S. W. 727.

- (b) *Erroneous instruction which does not confuse and mislead the jury.*

The giving of an erroneous instruction, where it does not have a tendency to confuse and mislead the jury, is not sufficient cause for reversing the judgment. *Carsons v. McDonald*, 38 Neb. 858, 57 N. W. 757.

Sec. 145. Charge to which objecting party can not make complaint.

- (a) *Defendant can not complain of instruction prejudicial to plaintiff.*

The defendant has no grounds to complain of an instruction confining the jury, in awarding damages, "to the diminution in actual salable value of plaintiff's property caused by obstructing the street so as to prevent access to said property by the shutting off of her means

of travel upon the public street." The instruction was prejudicial to plaintiff, if to anyone. R. Co. v. Lynch, 14 Ky. L. R. (abst.) 671.

(b) *Erroneous instruction more favorable to appellant than to appellee*

When an erroneous instruction is more favorable to appellant than appellee, it is error without prejudice. R. Co. v. Woodward, 4 Col. 1; Elder v. Schumachner, 18 Col. 433, but see dissenting opinion of Elliott, J., p. 447, 33 P. 175.

(c) *Where doubtful whether instruction hurt one party more than the other, the objecting party can not complain.*

As the injury complained of was the result of simple negligence on the part of either plaintiff or defendant, an instruction as to contributory negligence was unnecessary, and, as it can not be said that the instruction given on this subject was more hurtful to the one party than the other, the defendant can not complain. R. Co. v. Piner, 11 Ky. L. R. (abst.) 260.

(d) *Instruction beneficial to appellant.*

Where, in an action against a railroad company to recover damages for killing a person on its track, the court, in its instructions, erroneously speaks of the decedent as a trespasser, the fact that the rules laid down in the instructions as governing defendant's liability are not applicable to trespassers, is not ground for reversing a judgment against defendant, since defendant can not take advantage of an error in its favor. Lynch v. R. Co., 111 Mo. 601, 19 S. W. 1114; Holmes v. R. Co., 48 Mo. App. 79; State ex rel. Smith v. Roevers, 55 Mo. App. 448; State, to use of Henysbach v. Nalson Distilling Co., 60 Mo. App. 437.

- (e) *When right to recover is clear, error in instructions not considered.*

Where there is no doubt as to the facts, and the legal right to recover is clear, the court may decline to consider errors in instructions. *Piano Mfg. Co. v. Parmenter*, 41 Ill. App. 635; cf. *McLeod v. Sharp*, 53 Ill. App. 406.

Sec. 146. Conflicting instructions.

- (a) *Conflicting instructions harmless to appellant.*

Conflicting instructions are harmless when the points of conflict are erroneously favorable to the party complaining on appeal. *Vail v. R. Co.*, 28 Mo. App. 372; *Stein v. Hill*, 100 Mo. App. 38, 71 S. W. 1107; *Bank v. R. Co.*, 135 Mo. App. 74, 115 S. W. 517; *Miles v. Court of Honor*, 173 Ill. App. 187; *Luce v. Foster*, 42 Neb. 818, 60 N. W. 1027.

- (b) *Conflicting instructions where erroneous one is favorable to appellant.*

Conflicting instructions are not ground for reversal, when the erroneous instruction is favorable to appellant. *Wood v. Moulton*, 146 Cal. 317, 80 P. 92; *Webster v. Sherman*, 33 Mont. 448, 84 P. 878.

- (c) *Conflicting instructions in regard to burden of proof.*

Two conflicting instructions in regard to the burden of proof are not prejudicially erroneous, where the verdict was against the party upon whom the burden was properly imposed. *Farwell v. Cramer*, 38 Neb. 61, 56 N. W. 716.

- (d) *Correct instruction conflicting with incorrect requested by defendant is not error of which latter can avail himself.*

Where an erroneous instruction is given at the request

of the defendant, the giving of a correct instruction by the court, which is in conflict therewith, is not error to which the defendant can object. *Baldman v. Leng's Est.*, 126 Mich. 698, 8 D. L. N. 175, 86 N. W. 148.

(c) *Conflicting instructions on the question of the delivery of a telegram.*

In an action for negligent delay in the delivery of a telegram, the jury were instructed that if the operator acted prudently in intrusting the message for delivery to the addressee's son such action was not negligence. They were also instructed that by giving the message to the son for delivery, he became the company's messenger, so that any negligence by him in delaying delivery was imputable to the company. Held, that though the charges were contradictory, it was not ground for reversal of a judgment in favor of plaintiff, since an instruction adverse to defendant was not erroneous. *Mott v. W. U. Tel. Co.*, 142 N. C. 532, 55 S. E. 363.

Sec. 147. Court not insisting on jury making special findings.

(a) *Court not insisting on special finding by the jury.*

The action of the court in not insisting on a special finding, after having instructed that they might state in their verdict the amount found as exemplary damages, if prejudicial to either, was harmful to plaintiff rather than defendant. (Vt.) *Friedly v. Giddings*, 119 F. 438, affm'd, 128 F. 355, 63 C. C. A. 85, 65 L. R. A. 327.

(b) *Jury not required to answer all specific questions submitted.*

That the jury were not required to answer all the specific questions of fact presented to them, if erroneous, is harmless, where part of the questions, if answered, should

have been answered adversely to appellant, and the remainder were immaterial under the circumstances of the case. *Clark v. R. Co.*, 35 Kan. 350, 11 P. 134.

Sec. 148. Court promising to give and subsequently withholding charge.

(a) *Court promising to give and subsequently withholding charge.*

Where the court, in answer to a request for an instruction, says that he will charge it, although he does not think that it is sound, subsequent withdrawal and an express direction to the jury that they must follow the propositions of law as charged, renders the error and his conduct harmless. *Reilly v. R. Co.*, 65 App. Div. 453, 72 N. Y. Supp. 1080.

Sec. 149. Defect in instruction for plaintiff cured by those for defendant, and not inconsistent.

(a) *In action for possession of personal property, defect in instructions for plaintiff cured by those for defendant supplying the defect.*

In an action to recover the possession of personal property, involving the question as to actual and continued change of possession under the statute of frauds, where it is claimed by the defendant upon appeal that the instructions for plaintiff tended to mislead the jury to infer that merely constructive possession of the property was sufficient to uphold a transfer of the property to the plaintiff as against the attaching creditor, the jury could not be misled where the instructions, taken together as a whole, precluded such inference, and where it appears that even if the instructions objected to were not sufficiently definite as to the nature of the possession required, those given at the request of the defendant sup-

plied the defect, and were not inconsistent therewith. Doty v. O'Neill, 95 Cal. 244, 30 P. 526.

Sec. 150. Defective instruction cured by other instructions.

(a) *Defective instruction may be cured by other instructions.*

An instruction wanting in some particular may be cured by other instructions for the same party which supply the omission. Vinegar Hill v. Busson, 42 Ill. 45; cf. Piner v. Cover, 55 Ill. 391, where it was added, "If it can be inferred the latter were understood by the jury, as explaining and qualifying the former." Lee v. R. Co., 35 Misc. 841, 106 St. Rep. 111, 52 N. Y. Supp. 1115; Snyder v. Stribbling, 18 Okl. 168, 89 P. 222.

Sec. 151. Definitions and constructions.

(a) *Failure to instruct as to purpose of admitting parol evidence to enable court to construe ambiguous clause in written contract.*

Where parol evidence is admissible to enable the court to construe an ambiguous clause in a written contract, the failure to instruct as to the purpose of its admission is not reversible error, where the jury, under the other instructions, could not have been misled by such evidence. Kimm v. Walters (S. D. Sup.), 133 N. W. 277.

(b) *Charge erroneously construing an ordinance.*

A charge stated that a certain ordinance is "penal" in its nature, and must be construed strictly is harmless, although the ordinance is not penal, where it provides for summary proceedings, and must be construed strictly. Greencastle v. Martin, 74 Ind. 449.

- (c) *Refusal to construe written contract where meaning is clear.*

The refusal of an instruction as to the meaning of a clause in a written contract is not ground of error, where the meaning is clear, and it does not appear that it could have been misunderstood. *Singer Mfg. Co. v. Leeds*, 48 Ill. App. 297.

- (d) *Charge faulty in defining the preponderance of proof, if jury not misled.*

The mere fact that the charge of the court was technically faulty in defining the preponderance of proof, is not ground for reversing the judgment, if the jury were not misled, or, if the case, as a whole, was fairly presented to them, and especially if their verdict is obviously correct. *Patrick Red Sandstone Co. v. Skoman*, 1 Col. App. 323, 29 P. 21; *Williams v. Williams*, 20 Col. 51, 37 P. 614 (427); *Stoner v. Riggs*, 128 Mich. 129, 87 N. W. 109, 8 D. L. N. 557.

- (e) *Where instructions are correctly given under the pleadings and the evidence, misconstruction of a pleading is harmless.*

Where the court instructs the jury correctly as to the questions they are called upon to consider under the pleadings and the evidence, it is harmless error that the court misconstrues one of the pleadings in giving such instructions. *Stark v. Willetts*, 8 Kan. 203.

- (f) *Misconstruction of writings when cause failed otherwise.*

In a suit involving title to land, numerous documents were produced on both sides in support of their respective claims, and the court answered various questions as to the construction of said writings. It was alleged for

error that certain of the instructions were incorrect in law and misleading, but it appeared from the deed introduced by the appellant himself, his cause must have failed independently of such alleged error. Judgm't affm'd, *Franciscus v. Reijart*, 4 Watts (Pa.) 98.

(g) *Charge misinterpreting a contract is insufficient to reverse.*

Where, in an action to recover on an oral contract, there was a controversy as to its terms and as to the performance, and the court, in its charge, said, "Now, it is not for you, gentlemen, nor is it for this court, to say what this contract was;" but it also charged that the jury should "view the entire evidence and find what the contract was, and whether plaintiff had fulfilled his contract," and as it is not probable that the jury were misled, the judgment will not be reversed. *Yalé v. Newton*, 130 Mich. 434, 90 N. W. 37, 9 D. L. N. 99.

(h) *Instruction defining care required of decedent as reasonable care for his safety, instead of the high degree of care which the circumstances required.*

Where the jury could not have found that, even in the exercise of a high degree of care, which the circumstances required, decedent omitted to do anything which, if done, would have tended to prevent the happening of the accident, defendant was not prejudiced by a definition of the court requiring of decedent, as reasonable care for his own safety, instead of the high degree of care which the circumstances required. *Grace v. R. Co.* (Iowa Sup.), 133 N. W. 672.

(i) *Defendant not prejudiced by any defect in the court's definition of the term "conversion."*

Where, in an action for conversion of a tenant's crop, the undisputed evidence showed conclusively that defend-

ant converted plaintiff's sweet-potatoes, defendant was not prejudiced by any defect in the court's definition of the term "conversion." *Crow v. Ball* (Tex. Civ. App.), 99 S. W. 583.

(j) *Instruction that "conversion" means practically, in plain English, "stealing."*

An instruction to the jury, in an action for conversion, that "conversion" means practically, in plain English, "stealing," though error, is harmless to defendant. *Saunders v. Payne* (Com. Pl.), 12 N. Y. Supp. 735.

(k) *Inapplicable instruction cured by definition of "accident."*

Though an instruction that plaintiff could not recover if decedent's death was caused by an accident was inapplicable, it was harmless, in connection with an instruction to define "accident" as a casualty occurring without anyone's fault, and without assignable cause. *Felver v. R. Co.*, 216 Mo. 195, 115 S. W. 980.

(l) *Instruction defining probable cause in the abstract not sufficient to support an objection.*

Objection can not be predicated on instructions defining probable cause in the abstract, where the court would have been justified in finding, as a matter of law, that the evidence did not show probable cause. *Grines v. Greenblatt*, 47 Col. 495, 107 P. 1111.

(m) *Court defining ordinary care as such care "as an ordinarily prudent woman would 'usually' exercise," use of the word "usually" not commended.*

In an action to recover for personal injuries the court defined ordinary care as being such care "as an ordinarily prudent woman would usually exercise;" held that the use of the word "usually," while not to be commended,

did not constitute reversible error. Hoyt v. R. Co., 166 Ill. App. 361.

(n) *Instruction defining "assumed," that he took the chances of it.*

Defining "assumed" in an instruction as meaning that "he took the chances of it," was harmless error in a personal injury action. Beseloff v. Starndberg (Wash. Sup.), 113 P. 250.

(o) *Failure to construe negative pregnant as an admission did not substantially injure appellant.*

Where a pleading, by reason of being in the form of a negative pregnant is technically to be construed as an admission of certain material facts, the refusal of the court to give it that construction in a case decided on the merits, is not ground for reversal, where the losing party suffers no injury thereby further than in being deprived of the benefit of such admission. McCready v. Crane, 74 Kan. 710, 88 P. 748.

(p) *Misconstruction of marine insurance policy unaffffecting liability.*

In an action on an insurance policy for a loss sustained by capture of the vessel by the Confederate States, the lower court held that this was properly covered by the term "enemies," in the insurance policy, and judgment was entered for the plaintiff. Upon writ of error it was held that the risk was not covered by this term, but was covered by other terms in the insurance policy, and judgment was affirmed. Insurance Co. v. Chester, 43 Pa. 491.

(q) *Erroneous instruction defining the assumption of risk.*

Where, in an action for the death of a motorman in a collision between cars, the jury expressly found that decedent had no knowledge of the negligence of the

company, the error in an instruction defining assumption of risk and declaring that a servant does not assume the errors resulting from the negligence of the master was harmless. *R. Co. v. Roudebush* (Ind. App.), 88 N. E. 676.

Sec. 152. Embodying the pleadings in the instructions.

(a) Embodying the whole complaint in the instructions.

Embodying the whole complaint in the instructions is not generally to be commended, but is not reversible error. *R. Co. v. Butz* (Ind. App.), 98 N. E. 818.

(b) Copying the pleadings in the instructions.

Stating the issues by copying the pleadings in the instructions is not to be commended, but where such course has not resulted in prejudice, it is not ground for reversal. *Tabler v. Union Stock Yards Co.*, 85 Neb. 413, 123 N. W. 461.

Sec. 153. Erroneous implication harmless where point elsewhere correctly stated.

(a) Erroneous implication harmless where the point is elsewhere correctly stated.

An instruction which is merely open to an implication erroneous in a matter of law, is not ground of error where the point is correctly stated in express and affirmative terms in another instruction. *R. Co. v. Warner*, 22 Ill. App. 462, affm'd, 123 Ill. 38.

Sec. 154. Erroneous instruction disregarded by the jury.

(a) Erroneous instruction harmless where the jury disregarded it.

Giving an erroneous instruction is harmless error,

where the verdict shows that the jury disregarded it. *Morgan v. Jackson*, 32 Ind. App. 169, 69 N. E. 410; *Rick v. Lowry*, 38 Ind. App. 132, 77 N. E. 967; *Ellison v. Dove*, 8 Blackf. (Ind.) 571; *R. Co. v. Walch*, 12 Ind. App. 433, 40 N. E. 650; *R. Co. v. Manning*, 70 Ill. App. 239; *Slinglof v. Benner*, 174 Ill. 561; *Mighell v. Stone*, 74 Ill. App. 129; *Peterson v. Randall*, 70 Ill. App. 484; *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449; *Avery v. Moore*, 133 Ill. 74; *McNulte v. Enschede*, 134 Ill. 46; *Gwinne v. Crawford*, 42 Iowa 63; *Paake v. Conlan*, 43 Iowa 297; *McKay v. Leonard*, 17 Iowa 569; *Blackburn v. Powers*, 40 Iowa 681; *Lohee v. R. Co.*, 44 Mo. App. 645.

(b) *Error in instructions where not probable jury were influenced thereby.*

Error in instructions is not ground for reversal where, considering the evidence and the instructions as a whole, it is not probable that the jury were or could have been misled. *Leon v. Goldsmith*, 69 Ill. App. 22, affm'd, 173 Ill. 325; *R. Co. v. Anderson*, 166 Ill. 572.

Sec. 155. Erroneous instruction must not only be prejudicial, but against justice.

(a) *Erroneous instruction must not only be prejudicial but against justice.*

It is not every error in instructions that will justify a reversal. It must appear, not only that the error was prejudicial, but that substantial justice has not been done. *Quinlan v. Boderoch*, 78 Ill. App. 481.

(b) *To reverse erroneous instructions must mislead.*

Erroneous instructions are not ground for reversal, unless such as to mislead the jury. *Forgey v. Bank*, 66 Ind. 123; *Bickness v. Brandl* (Ind.), 91 N. E. 41.

Sec. 156. Erroneous instruction neutralized or cured by another.

(a) *Erroneous instruction cured by a proper one.*

In an action on a promissory note; the fact in dispute being the genuineness of the surety's signature, the court instructed the jury that the surety having denied signing the note, they might consider any evidence offered as to the genuineness of the signature, but that the note itself should not be considered to prove that the surety signed it. Held that, even if erroneous, in not stating to the jury that the disputed signature might be considered, in connection with other evidence bearing upon its genuineness, the instruction was rendered harmless by another instruction authorizing the jury to compare the name on the note with the surety's signature to his plea denying its execution. *Closson v. Bligh*, 41 Ind. App. 14, 83 N. E. 263; *Christiansen v. Dunham Towing & Wrecking Co.*, 75 Ill. App. 267; *R. Co. v. Locker*, 47 Md. 155; *Morish v. Mountain*, 22 Minn. 564; *Chase v. Vaderwerf*, 26 St. Rep. 861, 7 N. Y. Supp. 188; *Snyder v. Stribling*, 18 Okl. 168, 89 P. 222; *Kuhl v. Supreme Lodge Select Knights & Ladies*, 18 Okl. 383, 89 P. 1126; *Bagly v. Birmingham*, 23 Tex. 452; *Gamache v. Piquignot*, 16 Howard (U. S. Sup.) 451.

(b) *Erroneous instruction neutralized by another.*

An erroneous instruction may be neutralized by another. *Abraham v. Wilkins*, 17 Ark. 292.

(c) *Misdirection as to duty of railroads at crossing cured by qualification in subsequent charge.*

Where there was evidence showing that the railway crossing was a public highway by user, and the court charged, "That when a locomotive crosses a highway upon grade, the whistle must be blown or the bell rung

eighty rods before it reaches the highway," etc., defendant excepted, on the ground that the charge assumed that it was a public crossing, and the court then added, "If this is a highway the law applies to it, and it does not apply to private crossings." Held, that the last charge cured any error committed. *Lewis v. R. Co.*, 5 N. Y. Supp. 313, 11 Silv. Sup. Ct. 393, 24 St. Rep. 435, affm'd, 123 N. Y. 496, 34 St. Rep. 373.

Sec. 157. Erroneous instruction on issue not in the case.

(a) *Erroneous instruction on issue not in the case.*

In an action on a mutual benefit insurance certificate which was granted on the warranty of deceased that he had no disease, an instruction that plaintiff was precluded from a recovery, if the deceased had made untrue statements in his application for membership, which were prejudicial to defendant, though error, was not a ground for reversal, when the only question in dispute was whether the deceased had a cancer at the time of his application, there being no evidence of any other fatal malady. *Tobin v. Modern Woodmen of America*, 126 Mich. 161, 85 N. W. 472, 7 D. L. N. 739.

Sec. 158. Erroneous instruction unavailable where objecting party not entitled to recover.

(a) *Giving erroneous instruction not available to one not entitled to a verdict in any view of the evidence.*

The giving of an erroneous instruction is not ground of reversal at the instance of a party in whose favor there could not be a recovery in any view of the evidence. *Findlay v. Parker*, 24 Ga. 333; *Ivy v. State*, 8 Md. 287; *Andrews v. Jenkins*, 39 Wis. 476; *Lenitzky v. Canning*, 33 Cal. 299; *McPhail v. Buell*, 87 Cal. 115, 25

P. 266; Aspen Water & Light Co. v. City of Aspen, 5 Col. App. 12, 37 P. 78; Hoogland v. Cole, 18 Col. 426, 33 P. 151; Murge v. Jackson, Shf. 53 Fla. 323.

Sec. 159. Erroneous instruction which caused no injury.

(a) *Erroneous instruction which could cause no injury to plaintiff.*

Erroneous instruction which the record shows could cause no injury to plaintiff is not ground for reversal. Los Angeles C. A. v. Los Angeles, 103 Cal. 461, 37 P. 375; State Loan Co. v. Cochran, 130 Cal. 245, 62 P. 466; Cross v. Aby, 53 Fla. 311, 44 Ga. 46, 55, 18; R. Co. v. Wilcox, 33 Ill. App. 450; Monford v. Woodworth, 7 Ind. 83; R. Co. v. Ladd, 37 Ind. App. 90, 76 N. E. 790; Langford v. Ottumwa Water Power Co., 59 Iowa 283; Bank v. Breeze, 39 Iowa 640; Hall v. Stewart, 58 Iowa 681; Hall v. Ballou, 58 Iowa 583; Whitney v. Brown, 75 Kan. 678, 90 P. 277, 11 L. R. A. n. s. 468; Luke v. Johnnycake, 9 Kan. 511; R. Co. v. Persons, 51 Kan. 408, 32 P. 1083; R. Co. v. Jones, 48 Kan. 51, 28 P. 978; Arnold v. Browning, 12 Ky. L. R. (abst.) 142; State, for the use of Bacon, v. R. Co., 58 Md. 482; Sinclair v. Murphy, 14 Mich. 392; Cummings v. Stone, 13 Mich. 70; Seymour v. Detroit, C. & B. Rolling Mill Co., 56 Mich. 117, 22 N. W. 317, 23 N. W. 186; Pence v. Gale, 20 Minn. 257 (Gil. 231); Rollins v. St. Paul Lumber Co., 21 Minn. 5; Peevy v. Chulenburg-Broeckeler Lumber Co., 33 Minn. 45, 21 N. W. 844; Willoughby v. Comstock, 3 Hill (N. Y.) 389; Shorter v. People, 2 N. Y. 193; Salmon v. Olds & King, 9 Ore. 488; Burnell v. Maloney, 39 Vt. 579, 94 Am. Dec. 358; Brown Bread Co. v. Forrest, 1 Wash. Ter. 201; Barber Asphalt Pav. Co. v. Odasz (Wash.), 85 F. 754, 29 C. C. A. 631; Stoner v. Mace, 11 Wyo. 366, 72 P. 193, 73 P. 548; as, where two or more contribute to an injury,

one or all may be sued, not harmful though not justified, *Powley v. Swenson*, 146 Cal. 471, 80 P. 722.

Sec. 160. Error in charge immediately corrected by another.

(a) *Error in charge immediately corrected by another.*

Apparent error in a paragraph of the charge immediately corrected in the next following paragraph is harmless, and no ground for reversal. *Carpenter v. R. Co.*, 3 Mackey (D. C.) 225; *R. Co. v. Cumberland*, 12 App. (D. C.) 598; *R. Co. v. Clark*, 51 Ill. App. 626; *Ellis v. Petty*, 51 Ill. App. 636; *Whoran v. Argentina Tp.*, 112 Mich. 20. 70 N. W. 341, 3 D. L. N. 867; *Hamilton v. Barker*, 116 Mich. 684, 75 N. W. 133, 5 D. L. N. 108.

Sec. 161. Error in instruction harmless when judgment is clearly right.

(a) *Error in instruction harmless when judgment is clearly right.*

Where, on the facts, as shown by the record, the judgment of the trial court is clearly right, this court will not interfere on account of an error in an instruction. *R. Co. v. Blair*, 75 Ill. App. 659; *Atlas Furniture Co. v. Higgins Carpet Co.*, 71 Ill. App. 17; *Insurance Co. v. Bell*, 166 Ill. 400; *R. Co. v. Higgins*, 69 Ill. App. 412; *Kahn v. Sloan & Co.*, 72 Kan. 459, 83 P. 1103; *Cook v. Golbe Printing Co.*, 227 Mo. 471, 127 S. W. 332; *Dunlap v. Ind. Union Traction Co. (Ind. App.)*, 90 N. E. 904; *R. Co. v. Higgs*, 165 Ind. 694, 4 L. R. A. n. s. 1081, 76 N. E. 299.

Sec. 162. Errors in instructions which were not misleading.

(a) *Instruction containing a plainly clerical error.*

An error in instructions that is plainly clerical, and

which could not have misled the jury, is not ground for reversal. *Sehrt-Patterson Milling Co. v. Myrick*, 63 Kan. 887, 66 P. 647; containing harmless erroneous language, *Tobin v. Modern Woodmen of America*, 126 Mich. 161, 85 N. W. 472, 7 D. L. N. 739; giving requested instruction as from plaintiff for defendant, *O'Dea v. R. Co.*, 142 Mich. 265, 105 N. W. 746, 12 D. L. N. 718.

Sec. 163. General exception to charge insufficient.

(a) *Insufficient to except to an entire charge if any part be right.*

Where the entire charges given by the court to the jury are excepted to as a whole by one general exception, without specifying any particular charge or part of a charge to which the exception applies, if any of the charges thus excepted to are correct, such general exception can not be considered on appeal. *Campbell, Adm'r, v. Carruth*, 32 Fla. 264; *Jenkins v. Lykes & Barce*, 19 Fla. 148.

Sec. 164. Harmless error in defining probable cause.

(a) *Harmless error in instruction as to probable cause.*

Although the question as to what constitutes probable cause, in an action for malicious prosecution, is one of law, an instruction that, if the evidence disclosed certain things there was no probable cause is harmless error. *Scrivani v. Dondero*, 128 Cal. 31, 60 P. 463.

Sec. 165. Humanitarian and last chance doctrines.

(a) *In an action for death of passenger on an elevator, refusal to withdraw from the jury negligence under the humanitarian doctrine.*

Where, in an action for the death of a passenger on an elevator, the evidence of plaintiff did not present a

case under the humanitarian doctrine, but did present the issue whether the injury was caused solely by the negligence of decedent, and the defendant's evidence clearly showed that the operator realized the peril to decedent, but in his anger refused to make a simple turn of the hand that would have saved decedent's life, the refusal to withdraw from the jury negligence under the humanitarian doctrine was not prejudicial error to defendant. *Chambers v. Kupper-Benson Hotel Co.* (Mo. App.), 134 S. W. 45; *De Pue v. Flatau*, 100 Minn. 299.

(b) *In action by a brakeman for injuries instruction presenting the last clear chance rule was not prejudicial.*

In an action by a brakeman against a railroad company for injuries, an instruction presenting the last clear chance rule, though erroneous in predicating the plaintiff's right of recovery on his showing that he was, himself, "exercising all due care," was not prejudicial, where the evidence clearly showed that plaintiff's injury resulted from the negligence of his fellow servants. *Bunker v. R. Co.* (Utah Sup.), 114 P. 764.

(c) *In action for injuries to a child by street car, instruction applying the last clear chance doctrine.*

Where, in an action for injuries to a child struck by a street car, the undisputed evidence showed that the motorman saw plaintiff while she was in the gutter, and at all times thereafter until she stepped on the track and was injured, the error in an instruction authorizing a recovery if the motorman saw the plaintiff and her peril or could have seen it by the exercise of due care and failed to stop the car, arising from an erroneous application of the last clear chance doctrine, was not prejudicial. *Traction Co. v. Croly* (Ind. App.), 96 N. E. 973.

- (d) *Instruction that if plaintiff was seen on the track in time to avert a collision, it was defendant's duty to stop the train.*

In an action against a railroad for injuries at a crossing, the giving of an instruction that it was defendant's duty to stop the train, if it saw plaintiff on the track in time to avert the injury was harmless, though it did not refer to impending danger or peril, where being on the track was, under the circumstances, necessarily a position of peril. *Davis v. R. Co.*, 46 Mo. App. 180.

Sec. 166. Improper evidence cured by charge to disregard it.

- (a) *Improper evidence cured by charging the jury to disregard it.*

The admission of improper evidence affords no ground for reversal, where the jury is afterwards directed not to consider it, and it does not appear that their verdict was thereby influenced. *Townadin v. Nutt*, 19 Kan. 282; *Woods v. Hamilton*, 39 Kan. 69, 17 P. 335; *Brown v. School Dist.*, 1 Kan. App. 330, 40 P. 826; *R. Co. v. Blake*, 74 Ill. App. 175; *R. Co. v. Criss*, 15 O. C. C. 398. 7 O. C. D. 632.

Sec. 167. Improper instruction cured by evidence.

- (a) *Erroneous instructions insufficient to warrant reversal, where evidence is so clear and strong as to justify no verdict other than that rendered.*

Erroneous instructions are not sufficient to warrant a reversal of a case, where the evidence is so clear and so strong that the jury could not have been justified in arriving at any other verdict than the one actually rendered; and this rule applies to a case where the appealing

party fails to bring before the appellate court material evidence given at the trial. *Hoagland v. Cole*, 18 Col. 426, 33 P. 151; *Saube v. Collins*, 40 Ill. App. 426; *Decatur v. Boston*, 169 Ill. 340; *Hatt v. Evening News Ass'n*, 94 Mich. 114, 53 N. W. 952; *State, ex rel. Tubbessing, v. Haase*, 6 Mo. App. 586, memo.

(b) *Jury disregarding instructions of court is harmless when the verdict is equivalent thereto.*

In an action by the payee of a note against the makers who signed as partners, the partners answered separately, one partner pleading a general denial and limitations, and the co-partner adding to his answer a plea of release and payment. The co-partner offered a release by the payee, reciting that the co-partner had paid his part of the note. The evidence whether the payee received any money on signing the receipt was conflicting, and the court charged that if the payee received the money called for by the receipt, the verdict should be against him. The jury disregarded the instruction and found a verdict against the partners for the face of the note, after deducting the amount called for in the receipt, and a partial payment made by the partner. Held, that the partner was not entitled to have the verdict set aside because of the jury's failure to obey the instructions. *Kaplan v. Shapiro*, 103 N. Y. Supp. 922, 53 Misc. R. 606; erroneous instruction which jury disregarded, *Quinn v. Baldwin Star Coal Co.*, 19 Col. App. 497, 76 P. 552.

(c) *In a clear case erroneous charge will not vitiate the verdict.*

In a clear case an erroneous charge will not vitiate the verdict. *Braswell v. State*, 42 Ga. 609.

Sec. 168. Improper instruction with no evidence on which it could operate.

(a) *Improper instruction with no evidence on which it could operate.*

An improper instruction may be regarded as harmless, where there is no evidence on which it can operate; the jury can not be supposed to be influenced by it. *Partlow v. R. Co.*, 150 Ill. 321.

(b) *Instruction on point not arising in the case.*

An instruction given on a point not arising in the case, unless it is calculated to mislead the jury or prejudice them against the opposite party is not error for which the judgment will be reversed. *Shampay v. Chicago*, 76 Ill. App. 429.

Sec. 169. Inapplicable instructions.

(a) *Charge containing erroneous propositions of law not applicable to any evidence in the case.*

A judgment will not be reversed because the charge embraced an erroneous proposition of law which, so far as the record shows, had no application to any evidence in the case, although the record states that there was "other evidence," the nature of which does not appear. *Hudmon v. Cuyas* (Ala.), 57 F. 355, 6 C. C. A. 381; *Sawyer v. Flow*, 48 F. 152, 1 C. C. A. 56 (Ind. T.); *Witcher v. McPhee*, 10 Col. App. 298, 65 P. 806; *Dannenburgh v. Guernsey*, 80 Ga. 549, 7 S. E. 105; *R. Co. v. Sullivan*, 5 Kan. App. 882, 7 Kan. App. 527, 48 P. 945; *Justice v. Mondell*, 53 Ky. (14 B. Mon.) 10; *Shattuck v. Eldredge*, 173 Mass. 165, 53 N. E. 377; *English v. Caldwell*, 30 Mich. 362; *Sandler v. Bresnahan*, 53 Mich. 567, 19 N. W. 188; *Blackman v. Wheaton*, 13 Minn. 326 (Gil. 299); *Brown v. Nagel*, 21 Minn. 415; *Rowell v. City of St. Louis*, 50 Mo. 92; *Dilly v. R. Co.*, 55 Mo. App.

123; *Carlton v. Bank*, 85 Neb. 659, 124 N. W. 91; *Rawson v. Ellsworth*, 13 Wash. 667, 43 P. 934.

Sec. 170. Inconsistent instructions.

(a) *Erroneous and inconsistent instructions.*

Where, in an action on a contract accepting a draft, plaintiff was entitled to recover in case his assignor purchased the draft on the faith of defendant's letter, and the court so charged, a further instruction, that if the jury found that the letter containing defendant's promise was intended to include the draft in question, and that plaintiff's assignor purchased the same on the faith of such letter, they should find for plaintiff, though erroneous and inconsistent with the former, was not prejudicial to defendant. *James v. E. G. Lyons Co.*, 147 Cal. 69, 81 P. 275; *Park Bros. & Co. v. Bushnell* (N. Y.), 60 F. 583, 9 C. C. A. 138; *Hogg v. Jackson & Sharp Co.* (Md.), 26 A. 869; *Barry v. R. Co.*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610.

(b) *It is the rule that where two inconsistent instructions are given, one correct and one incorrect, the court will not assume that the jury followed the correct one, except where the incorrect is unprejudicial.*

The rule that where two inconsistent instructions are given, one correct and one incorrect, the court will not assume that the jury followed the correct statement of the law, applies only where the incorrect instruction is prejudicial. Where the incorrect instruction was given at the request of a party, which stated the law more favorably to the party than he was entitled to, and another instruction was given which correctly stated the law, the party requesting the incorrect instruction can not complain of the inconsistency of the instructions. *Denver Con. Elec. Co. v. Lawrence*, 31 Col. 301, 73 P. 39.

- (c) *Inconsistent instructions that are each more favorable to appellant than he was entitled to.*

The rule that if two or more instructions are inconsistent and calculated to mislead the jury, it is ground for reversal, will not be applied where each of the instructions was more favorable to appellants than they were entitled to. *In re Darrow* (Ind. Sup.), 92 N. E. 369.

Sec. 171. Incorrect charge rectified by another proper one.

- (a) *Incorrect charge rectified by another proper one.*

An instruction which apparently leaves to the jury a question of law as well as fact can not be successfully assigned as error, if another instruction or charge, which was given, corrected the error by defining the law. *Seaboard R. Co. v. Scarborough*, 52 Fla. 425.

Sec. 172. Instructions as to impeached witnesses.

- (a) *Instruction that if the jury believe any witness has been "successfully impeached," they would be warranted to disregard his testimony, unless corroborated.*

An instruction that if the jury believe any witness has been "successfully impeached" they would be warranted in disregarding his testimony, unless corroborated, while objectionable for want of explanation of the term "successfully impeached," is not ground for reversal, where the case is not so close on the evidence that the verdict may reasonably be said to have been influenced or determined by it. *Metzger v. Manlove*, 241 Ill. 113, 89 N. E. 249.

Sec. 173. Instructions as to manner of weighing evidence.

- (a) *Instruction that evidence consisting of mere repetition of oral statements is subject to much imperfection and mistake, etc.*

An instruction that evidence consisting of mere repetition of oral statements is subject to much imperfection and mistake, etc., if erroneous, as invading the province of the jury, was harmless, it not appearing that there was any testimony whatever of any oral statements made by anyone. In re Budan's Est. (Cal. Sup.), 104 P. 442.

- (b) *Instruction that the jury should not give greater weight to the plaintiff "merely" because she is a girl.*

The court instructed that the jury should weigh the evidence by the same rules it would weigh if the contest were between individuals, but should not give greater weight to the testimony for plaintiff "merely" because she is a girl and defendant is a corporation. Held, that if it was error for the court to use the word "merely" because it would imply that otherwise it was proper to give greater weight to the testimony of plaintiff's witnesses than to those of the defendant, the error was harmless. Jones v. Springfield Traction Co., 137 Mo. App. 408, 118 S. W. 675.

- (c) *Where juror indicated that he made independent investigation charge that jury should not substitute their judgment for the proof.*

Where a juror, during the argument, indicated that he made independent investigation, any error of the court in orally stating that the jury should not substitute their judgment for the proof was not prejudicial, even if the instruction be deemed within the code provision relative to the giving of written instructions before the argu-

ment. *Denver City Tramway Co. v. Armstrong* (Col. App.), 123 P. 136.

Sec. 174. Instruction as to permanency of injury.

(a) *Instruction as to permanency of injury.*

Where there was no question of plaintiff's serious physical injury and the loss of an eye therefrom, an instruction that, in fixing the damages, the jury should consider whether the injury was probably permanent, and how much pain, physical or mental, plaintiff had undergone or would probably undergo, was harmless to defendant, in so far as it assumed that plaintiff had suffered or would suffer pain. *Van Camp Hardware & Iron Co. v. O'Brien*, 28 Ind. App. 152, 62 N. E. 464.

Sec. 175. Instructions as to values and earning ability.

(a) *In action for personal injuries, instruction that jury should take into consideration loss of time and diminution of earning capacity.*

In an action for personal injuries, an instruction that the jury should take into consideration any evidence showing loss of time by plaintiff and diminution in his ability to earn money, though the only evidence on the subject was to the effect that plaintiff had earned more money after the injury than before, was harmless error. *Hohenstein-Harmetz Furniture Co. v. Matthews* (Ind. App.), 92 N. E. 196.

(b) *Defendant was not prejudiced by instruction to find for plaintiff for the value of his services.*

Where, in an action by an employee to recover the wages agreed on hiring for an indefinite period, the employee had reported for duty, and had held himself in readiness to perform the services required, and the evidence tended to show the value of plaintiff's service

was, what the contract by fair implication called for, defendant was not prejudiced by an instruction authorizing the jury to find for plaintiff the value of the services as appeared from the evidence, although, as a matter of law, the criterion of recovery was the contract price. *R. Co. v. Harvey*, 15 Ky. L. R. (Ky. Superior Court), 809.

- (c) *Where injuries suffered were serious and permanent, instruction that employee might be compensated, "on account of his impaired earning capacity in the future."*

Where the injuries suffered by an employee were of the most serious nature and permanent in their character, and it was conceded that he was entitled to recover. The award of the jury was not excessive; the employer could not have been prejudiced by an instruction that the employee might be allowed compensation "on account of his impaired earning capacity in the future." *Reed v. Village of Syracuse*, 83 Neb. 713, 120 N. W. 180.

- (d) *In action by employee for services, instruction to find on the basis of the contract price, less damage for breach of contract.*

Where the employee sues for the value of services rendered before the termination of the employment, alleges that the contract price was the reasonable value, and the employer did not show that the services were worth less, an instruction to find for the employee on the basis of the contract price less damages for breach of contract, was not prejudicial to the employer. *Porter v. Whitlock* (Iowa Sup.), 120 N. W. 649.

- (e) *In an action for personal injuries, instruction to allow plaintiff for expenses which he was put to for medical attention.*

In an action for personal injuries an instruction to allow

plaintiff for expenses which he was put to for medical attention, although inaccurate in omitting a direction to find only in such sum as would represent the reasonable value of the medical services, was not so prejudicial as to require reversal of a judgment for plaintiff, where it appeared that plaintiff incurred an obligation of \$50 for doctor's bills, and the evidence tended to show that the services rendered were of that value. *Burley v. Menefee*, 129 Mo. App. 518, 108 S. W. 120.

(f) *Instruction that plaintiff could recover only for such loss of wages as he proved he suffered, and only for such expense as he proved he incurred.*

Any error in instructing, in an action by a minor for an assault and battery, as to recovery for expenses and loss of wages, the court distinctly stated plaintiff could recover for only such loss of wages as he proved he had suffered, and for only such expenses as it had been proved he had been put to, is not ground for reversal, no expenses being proved or claimed to have been paid by anyone, and it having appeared from the conceded facts that the matter of loss of wages could not have exceeded \$5 or \$6. *Bozudsky v. Backes*, 83 Conn. 208, 76 A. 540; *Jennings v. Appleman* (Mo. App.), 139 S. W. 817.

(g) *Instruction allowing recovery for medical expenses conditioned upon the incurrance of such expenses.*

An instruction allowing a recovery for medical expenses conditioned upon the incurrance of such expenses was not prejudicial, where plaintiff failed to introduce any evidence upon such subject. *Thomas Madden's Son & Co. v. Wilcox* (Ind. Sup.), 91 N. E. 933, rev. judg. (Ind. App.), 88 N. E. 871; *Trade Co. v. Ulrick* (Ind.), 90 N. E. 321.

- (h) *Error in instruction as to the value of medical services.*

Where there is no evidence of the value of medical services rendered plaintiff, it is harmless error to charge that the jury should consider the expense for such services in estimating damages. *R. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246.

- (i) *In action for value of sheep killed by dogs, instruction that if selectman notified did not perform his duty plaintiff could recover.*

Where, in an action against a town for the value of sheep killed by dogs, defendant's evidence showed that its selectman failed to perform his duty to determine whether the damage had been done by dogs, and the court should therefore have submitted the case on the general issue only, the town was not prejudiced by an instruction that if the selectman notified did not make a full, fair and honest investigation, he did not perform his duty, and the plaintiff could recover if he made out his case in other respects. *Otis v. Town of Bridport*, 81 Vt. 493, 70 A. 1061.

- (j) *Instruction referring to sum stated in the ad damnum as the limit in the award of damages.*

It is not ground of error, though it is not to be commended, that the court gave an instruction, referring to the sum stated in the ad damnum as the limit in the award of damages, the verdict being for only half that sum. *R. Co. v. O'Hara*, 150 Ill. 580.

Sec. 176. Instructions awkward in form and ungrammatical.

- (a) *Instructions awkward in form and ungrammatical.*

Instructions awkward in form and ungrammatical are

not, for that reason, prejudicially erroneous, unless likely to mislead the jury. *Zelenka v. Union Stockyards Co.* (Neb. Sup.), 118 N. W. 103.

Sec. 177. Instructions cured erroneously admitted or excluded evidence.

(a) *Instruction cured exclusion of evidence as to horse's reputation.*

Where the court excluded evidence of a horse's reputation for skittishness and fear of dogs under one form of question, but admitted it under another, a charge that, if plaintiff, at the time of the accident, was driving an unsafe horse, in the habit of being unduly frightened at dogs going about in an ordinary manner, and such habit of the horse was the approximate cause of the injury, then the plaintiff could not recover; the charge cured any error there might have been in the ruling. *Willet v. Goetz*, 125 Mich. 581, 84 N. W. 1071, 7 D. L. N. 624; *Reeves v. French*, 20 Ky. L. R. 220, 45 S. W. 771.

(b) *Error in admitting city ordinance cured by withdrawal from the consideration of the jury.*

On the trial of an action against a street railroad company for killing a child on the track, a certain ordinance of the city requiring a gripman, on the first appearance of danger to persons on the track, to stop the car in the shortest time possible, was introduced over objections of defendant. Thereafter, on request of plaintiff's attorney, the court instructed that such ordinance had no application to the case, and was withdrawn from the consideration of the jury, at the request of plaintiff; inasmuch as there was no claim that defendant's gripman did not stop the car, after discovering the danger, in the shortest time possible. Held, any error in admitting the ordinance was harmless. *Schmidt v. R. Co.*, 163 Mo. 645, 63 S. W. 834.

(c) *Erroneously admitted evidence cured by instructions.*

In an action by the owner of a building against the contractor who erected it for damages alleged to have been caused by the contractor's failing to use proper material in plastering, or to do the work in a workman-like manner, the admission of evidence that defendant was not notified when the plaster fell off, nor requested to perform the work of repairing, was harmless, where the instructions directed the attention of the jury only to the specific issues presented by the pleadings. *Tausig v. Wind*, 98 Mo. App. 129, 71 S. W. 1098; *Sheehan v. R. Co.*, 72 Mo. App. 524; *Buckman v. R. Co.*, 100 Mo. App. 30, 73 S. W. 270; *Nichols & Shepard Co. v. Hardman*, 62 Mo. App. 153; *Strant v. Hayward*, 37 Mo. App. 585; *Knox v. Hunt*, 18 Mo. 174; *Anderson v. R. Co.*, 161 Mo. 411, 61 S. W. 814; *Muth v. R. Co.*, 87 Mo. App. 422; *Grady v. St. Louis Transit Co.*, 102 Mo. App. 212, 76 S. W. 673; *Insurance Co. v. Buchanan*, 100 Ind. 63; *Cook v. Robinson*, 42 Iowa, 474; *Wheeler v. Beecher*, 79 Mich. 443, 44 N. W. 927; *Blaisdell v. Scally*, 84 Mich. 149, 47 N. W. 585; *Mitts v. McMoran*, 85 Mich. 94, 48 N. W. 288.

(d) *Improper evidence cured by limiting consideration of jury to defects specifically charged in the petition.*

In an action against a railroad company for damages for personal injuries sustained in an accident, evidence was given for plaintiff as to the condition of the track a mile and a half from the place of the accident. Held that, while such evidence was incompetent and inadmissible, yet the error was cured by an instruction limiting the consideration of the jury to the defects specifically charged in the petition. *Sidekum v. R. Co.*, 93 Mo. 400, 4 S. W. 701, 3 Am. St. Rep. 549.

- (e) *Jury cautioned not to consider improper evidence cured its admission.*

Where evidence is received which could only be made pertinent by other proofs not furnished, and the jury are subsequently instructed, in the absence of such further evidence, to disregard it, the defendant can not allege error upon its admission. *People v. Pitcher*, 15 Mich. 397.

Sec. 178. Instruction employing the phrase, "If you believe from the evidence."

- (a) *The use of the phrase, "If you believe from the evidence," instead of, "If you believe from a preponderance of the evidence."*

The use of the phrase, "If you believe from the evidence," instead of the phrase, "If you believe from a preponderance of the evidence," does not constitute prejudicial error. *R. Co. v. Zink*, 133 Ill. App. 127, judgment affirmed, 229 Ill. 180, 82 N. E. 283.

Sec. 179. Instruction employing unusual words without explaining them to the jury.

- (a) *Instruction using, but not explaining the term "preponderance."*

The use of the unexplained term "preponderance," in an instruction, is not ground for reversal when there were no other errors. *Edmonston v. Henry*, 45 Mo. App. 346; *Mulligan v. R. Co.*, 79 Mo. App. 393.

Sec. 180. Instruction failing to limit the liability.

- (a) *Instruction failing to limit the liability to the amount prayed in the petition.*

In a personal injury case, where the instructions failed to limit the amount of recovery to the amount prayed in the petition, the error was harmless, where the award

was less than the amount prayed in the petition. *Sampson v. R. Co.*, 156 Mo. App. 419, 138 S. W. 98; *Grant v. R. Co.*, 25 Mo. App. 227.

(b) *Instruction failing to limit liability where evidence shows non-existence thereof.*

Where an instruction, in stating the liability of defendant, fails to notice a limitation on that liability, but the evidence clearly shows the non-existence of such limitation, the error in failing to state the limitation will be deemed to be without prejudice. *Brenner v. R. Co.*, 68 Iowa, 530.

Sec. 181. Instruction failing to present facts shown by appellant's evidence.

(a) *Instruction failing to present facts shown by appellant's evidence.*

A cause will not be reversed on appeal because of the existence of certain facts, as a basis for recovery, which were not presented truly to the jury by instructions, where appellant's own evidence showed such facts. *Dimmitt v. R. Co.*, 40 Mo. App. 654.

Sec. 182. Instructions in actions concerning animals.

(a) *Instruction, in action for injuries from automobile frightening animal, that defendant "did not run to the side of the road."*

Code of Pub. Gen. Laws 1904, art. 56, sec. 135, makes it the duty of a person operating a motor vehicle to "go as far as practicable to the side of the road" on discovering that his vehicle is frightening an animal. In an action to recover for injuries resulting through failure to comply with that statute, an instruction stated that defendant "did not run to the side of the road." Held,

that while it would be better to follow the language of the statute, the error was not sufficient to justify a reversal. *Fletcher v. Dixon* (Md. Sup.), 68 A. 875.

(b) *In an action for killing a dog, instruction that dogs were property under the law.*

In an action for the killing of a dog, an instruction that dogs were property under the law of the state, is not reversible error, though there was no contention that dogs were not such property. *Brisco v. Laughlin* (Mo. App.), 143 S. W. 65.

Sec. 183. Instructions in general.

(a) *Charge upon an immaterial issue.*

A charge upon an immaterial issue, which is harmless, is not ground for reversal. *Marsalis v. Patton*, 83 Tex. 521; *Blackwell v. Smith*, 8 Mo. App. 43; *Otto v. Beat*, 48 Mo. 23; *Purchen v. Peck*, 2 Mont. 574.

(b) *Instruction allowing no difference on contract payable in Canada currency.*

A contract provided that payment should be made in Canada currency, or its equivalent in United States money. Held, that in an action on the contract, there was no ground for an exception to the court's refusal to direct the jury to allow nothing for the difference in the currencies, where there was, in fact, no difference between them. *Holland v. Rea*, 48 Mich. 218, 12 N. W. 167.

(c) *Where allegation in complaint is denied by the answer, it is error to instruct that fact is admitted if evidence shows it was not contested.*

Where an allegation in the complaint is denied by the answer, it is error to instruct the jury that it is admitted that when the evidence shows that the fact was not con-

tested, was established by the evidence, and there was no conflict of testimony. Held, that the error did not prejudice. *Dyer v. McPhee*, 6 Col. 174.

- (d) *Admitting evidence of matter not in issue cured by instruction presenting the real issue.*

An error in admitting evidence of a matter not in issue may be cured by an instruction which distinctly presents the real issue. *R. Co. v. Walter*, 147 Ill. 60.

- (e) *Instruction which failed to require the jury to find on certain uncontroverted facts.*

Instructions for plaintiff, which failed to require the jury to find on certain facts, as to which there was no controversy on the trial, were not prejudicial. *Newcomb v. Blakely*, 1 Mo. App. 289.

- (f) *Instruction requiring proof of act unessential to plaintiff's recovery.*

The fact that an instruction directed attention to an act not proven, nor essential to be proven, to entitle plaintiff to a verdict, is not ground for reversal, when the other facts and acts predicated in the instructions were amply sufficient to support the verdict which the evidence tended to establish. *Gaty v. Sack*, 19 Mo. App. 470.

- (g) *Instruction objected to by plaintiff cured by one given for defendant.*

A defendant is not prejudiced by instructions which correctly enunciate a legal proposition in general terms, when those facts which might deprive the plaintiff of the benefit of the principle announced in his instructions are definitely stated in instructions given for defendant. *Klutts v. R. Co.*, 75 Mo. 642.

- (h) *Instruction extending the cause of the injury beyond that stated by the plaintiff.*

Where, in an action against a railroad company for damages because of the killing of plaintiff's horse, there was no evidence that the horse ran into any object, unless he ran into the trestle, an instruction that did not limit the jury in their finding as to the cause of the injury to the one mentioned in the statement, viz., "That the horse ran into the trestle," but added, "or any other object along the line of the road," was not prejudicial. *Matney v. R. Co.*, 30 Mo. App. 507.

- (i) *Instruction failing to require that plaintiff relied on defendant's promise.*

In an action by an adjoining landowner for injuries sustained by the negligent performance of a contract to protect his wall, although the instruction is open to criticism, in that it fails to require the jury to find that plaintiff relied on defendant's promise, the omission is harmless, where all the evidence tended to prove that plaintiff did rely on the promise. *Delaney v. Bowman*, 82 Mo. App. 252.

- (j) *Instruction authorizing recovery without proof of knowledge of the defect by the master.*

In an action by a servant for personal injuries alleged to have been caused by negligence of the master in allowing the floor to become defective, an instruction authorizing a recovery by plaintiff, without requiring a finding that the master had knowledge of the defective floor, was harmless, where the evidence clearly showed that defendant's servant, to whom had been delegated the duty to keep the place safe knew of the defect, and of its being unsafe. *Zellars v. Missouri W. & I. Co.*, 92 Mo. App. 107.

(k) *In action for personal injuries, instruction allowing recovery for expenses for medical services.*

Where, in an action for personal injuries, the petition demanded damages for expenses for medical services, and the evidence showed the rendition of medical services, but did not show payment therefor, nor an express contract to pay, nor the reasonable value of the services, and the amount of the verdict was justified by the evidence, the error in allowing plaintiff the value of medical aid was not reversible. *Herndon v. City of Springfield*, 137 Mo. App. 513, 119 S. W. 467.

(l) *Misdirecting the jury as to the ownership of logs.*

Defendant claimed that logs, which the jury must have found he placed in the highway, belonged to his wife. The court charged that, if defendant had admitted to witness that the logs were his, he was estopped from saying, "the woman did it." Held that, as defendant was liable if he placed the logs in the highway, without regard to the ownership, this charge could not have harmed him. *McDermott v. Conley*, 33 St. Rep. 560, 11 N. Y. Supp. 403.

(m) *When language of charge excepted to, explanation cured error.*

Where a charge is excepted to as misstating the evidence, and the judge denies that he intended the meaning placed upon his statements by counsel, and proceeds to make a plain and correct statement, the error, if any, is cured. *Pollock v. R. Co.*, 39 St. Rep. 568, 15 N. Y. Supp. 189, *affm'd*, 133 N. Y. 624.

(n) *Instruction overstating the care to be exercised to avoid danger, cured by further statement to which counsel did not except.*

In an action for an injury to plaintiff riding as a guest

in a two-seated surrey, by a collision with defendant's car at a street crossing, the error involved in qualifying charge, "That if by looking he could have seen, and if by listening could have heard things which would have enabled him to have avoided the danger, or to have prevented accident or injury, it is negligence to have disregarded those precautions." Held, to have been cured by a statement made immediately after, that this was stated in connection with the use or exercise of ordinary care in listening or looking, counsel taking no further exception. *Zingrebe v. R. Co.*, 44 App. Div. 577, 94 St. Rep. 913, 60 N. Y. Supp. 913.

(o) *Erroneous charge as to care cured by finding that he used none.*

An erroneous instruction as to the degree of care that should have been used by appellant's agent to avoid the accident is harmless, where the jury rightfully found that he used no care. *R. Co. v. O'Laughlin (Okl.)*, 49 F. 440, 1 C. C. A. 311.

(p) *Charge objectionable for generality.*

Although the reviewing court may see how the generality of the charge may have made a wrong impression on the jury, yet such charge is not necessarily error for which the judgment will be reversed, when the defendant asks no explanation of the charge by the judge. *Sweat v. Rogers* 62 Tenn. (6 Heiskel) 117.

(q) *Particular expressions in a charge immaterial if principle substantially correct.*

It is a general rule that a judge's charge is not to be held erroneous on account of particular expressions, if the principle given by him, with all its qualifications, is substantially correct. *Porter v. Campbell*, 49 Tenn. (2 Baxter) 81.

(r) *Disregard of general charges by the trial court.*

Where exhibits annexed to a petition for a new trial conflict with the general charges in the petition, relied on as ground for the action of the court, a disregard of such general charges by the court below, is not ground for reversal on appeal. *Bryerly v. Clark*, 48 Tex. 345.

(s) *Stretching instruction beyond what the testimony supported.*

Where the evidence showed that many people, negligent boys, daily used a railroad trestle as a walk-way, a statement, in an instruction, that hundreds of men and children so used it, is not such a departure from the facts as to operate to the prejudice of a party. *R. Co. v. Rogers's Adm'r*, 100 Va. 324, 41 S. E. 732.

(t) *More favorable instruction cured error in refusing one less so.*

Where the court charged that if plaintiff knew of the projecting set-screw from a shaft by which he was injured while in defendant's employ, he could not recover at all, defendants could not object to the refusal of an instruction that, if plaintiff had such knowledge, he could not recover more than \$3,000. *National Fire Proofing Co. v. Andrews (Ohio)*, 158 F. 294, 85 C. C. A. 526.

(u) *Charge of the court which lacked dispassionate calmness.*

That a portion of a charge lacked the dispassionate calmness with which a judicial utterance should be made, is not, of itself, ground for reversal. *Horton v. Chevington & B. Coal Co.*, 2 Penny. (Pa.) 25.

(v) *Instruction that if defendant got horse, with plaintiff's consent, demand must precede action to recover.*

The court directed the jury that if the defendant ac-

quired possession of the horse with the permission of the plaintiff, the latter must previously have demanded the horse to entitle him to maintain the action. Held that, as both parties claimed the property in the pleadings, the instruction was error without prejudice. *Peake v. Conlan*, 43 Iowa 297.

(w) *Charge leaning towards one party, but containing nothing unfair or misleading.*

The fact that a charge leans somewhat towards one party is not reversible error, where it contains nothing unfair or misleading, and does not withdraw the facts from the jury. *Yundt v. Newhard*, 132 Pa. St. 324, 19 A. 288.

(x) *Instructions unconnected with the material issues in the case.*

Where erroneous instructions are given on issues wholly unconnected with the only material issues in the case, such errors will not be ground for reversing the judgment, where the verdict rendered is the only one the jury could properly render under the circumstances. *Bushey v. Glenn*, 107 Mo. 331, 17 S. W. 969.

(y) *Hypothetical charge upon facts established by the evidence.*

That the court charged hypothetically upon facts established by evidence is not reversible error, where the jury was not improperly influenced thereby. *Thomas v. Ingram*, 20 Tex. 727.

(z) *Where court gave two instructions, the first correct and jury confined their verdict thereto; the erroneous second was harmless.*

Where the court gave two instructions, the first of which was correct and the jury returned their verdict

expressly stating that they rendered it under the first instruction; even if the second instruction was erroneous, there was no ground for reversing the judgment. *Binns v. Waddill*, 32 Gratt. (Va.) 588.

(a-1) *Instruction to allow interest not followed by the jury.*

Instructions that the jury may allow interest are not ground for reversal, if they do not allow it. *Eddy v. Lafayette*, 163 U. S. 456, 41 L. ed. 225.

(b-1) *Charge that whether you believe the evidence for plaintiff or the claimant, you must find for plaintiff.*

While a charge given, without request of either party, in the following language, "I charge you, whether you believe the evidence for the plaintiffs or the claimant, you must find for the plaintiffs," is improperly given under the statute, Code, sec. 3326, it is error without injury, when the plaintiff's right to recover is established, either by record evidence or admitted facts, so as not to depend upon the credibility of oral testimony. *Schloss v. Inman*, 129 Ala. 424, 30 S. 667.

(c-1) *Error in instruction, where verdict is special and independent of any principle of law.*

Error in general instructions to the jury as to matters of law will be deemed error without prejudice, where the verdict of the jury is special, having no connection or relation whatever with any principle of law. *Wilkinson v. Insurance Co.*, 30 Iowa 110.

(d-1) *Erroneous but unprejudicial instruction requiring proof that defendant executed contract.*

In an action upon a written contract, where the court instructed the jury that, in order to recover, plaintiff must prove that defendant executed the contract; held,

that while the instruction might be erroneous, it was not prejudicial, as there was no dispute concerning the genuineness of the signature, the defense being that it was obtained by fraud. *Esterly v. Epplerheimer*, 73 Iowa 260.

(e-1) *Instructing in accordance with the proofs before requiring the pleadings to be amended.*

Giving an instruction in accordance with the proofs on the subject of damages before requiring the pleadings to be amended to meet the proofs, and permitting them afterward to be so amended, is not ground for reversal, where no existing issue was changed, and no new issue presented by the amendment, and no substantial right of the complaining party was prejudiced. *Baird v. Truitt*, 18 Kan. 120.

(f-1) *Jury directed to connect objectionable testimony, and if unable to do so to disregard it.*

In an action against a railroad company for the destruction of a building by fire, the admission of testimony with reference to other fires that originated from engines on defendant's road, without identification of the engine attached to the particular train or the engineer in charge of it as the one causing the fire, was not cause for reversal, where the court instructed that unless the jury could connect the engine with the fires they should not consider the evidence. *R. Co. v. Matthews*, 58 Kan. 447, 49 P. 602, *affm'd*, 174 U. S. 96.

(g-1) *Instruction that ordinary care is that degree of care which ordinarily prudent and "skilful" men usually exercise.*

Any error in an instruction that ordinary care is that degree of care which ordinarily prudent and "skilful" men usually exercise, was merely technical and was harmless, especially where the party complaining that

objected to the particular instruction, did not offer any instruction on the point. *R. Co. v. Otis's Adm'r*, 25 Ky. L. R. 1686, 78 S. W. 480.

(h-1) *Instruction that if plaintiff knew the chute on the street was open and attempted to pass it in the darkness, he could not recover for injuries received.*

It was harmless error to instruct the jury that if plaintiff knew the chute on the street was open, and attempted to pass the place when, by reason of the darkness he could not see it, he could not recover, there being no testimony tending to show plaintiff's knowledge as to the chute. *Reeves v. French*, 20 Ky. L. R. 220, 45 S. W. 771.

(i-1) *Instruction requiring city to keep sidewalks in "safe" condition, instead of "reasonably safe."*

In an action for injuries from a hole in a city pavement about two feet deep and three feet wide, and extending across the pavement, it is not prejudicial error to instruct that it was the city's duty to keep its sidewalks in "safe" condition for travel, instead of "reasonably safe." *City of Covington v. Jones*, 25 Ky. L. R. 1983, 79 S. W. 243.

(j-1) *Charge to find for plaintiff if jury believed the horse became frightened either at the speed or the noise of the automobile.*

In an action for injuries sustained by plaintiff by his horse having been frightened by defendant's automobile which, it was alleged was running at an excessive speed, defendant and another witness testified that the operation of the machine was always accompanied by noise. The court instructed that, if defendant was operating the automobile at a high rate of speed, and because thereof, or because of such speed together with the noise,

the horse became frightened, and defendant's conduct in operating the automobile at such speed was negligence, plaintiff was entitled to recover. Held, that if there was any error in the instruction, in that it authorized the jury to find for plaintiff if they believed the horse became frightened either at the speed or the noise, while fright by noise was not pleaded, it was not prejudicial. *Shinkle v. McCullough*, 25 Ky. L. R. 1133, 77 S. W. 196.

(k-1) *Error as to amount plaintiff's husband spent in saloon cured by instruction.*

In an action under the civil damage act, error in the admission of testimony as to the amount spent by plaintiff's husband in defendant's saloon, is cured by a subsequent charge to the jury that no recovery can be had for such money. *Manzer v. Phillips*, 139 Mich. 61, 102 N. W. 292, 11 D. L. N. 748.

(l-1) *Special instructions cured by instructions to find for defendant.*

Where a case has been given to the jury, with special instructions, but on the jury coming in without having agreed, these instructions are recalled, and the jury are charged, in substance, to find for defendant, and they return a verdict accordingly, these special instructions are thereby superseded, and will not be reviewed on error, as the verdict was not found on them. *Kelby v. Hendrie*, 26 Mich. 255.

(m-1) *Erroneous instruction as to parol contract for driving logs.*

An instruction permitting the jury to find that a parol contract by which each party was to drive the other's logs, contemplated a liability for any excess in the value of the services rendered, if erroneous, was not prejudi-

cial to appellant. *Bellows v. Crone Lumber Co.*, 126 Mich. 476, 85 N. W. 1103, 8 D. L. N. 76.

(n-1) *Charge treating a gift to daughter as in futuro.*

Where a son permits his father, on receiving property from him, to pay a certain sum to a daughter on the father's death, error in treating the transfer of such chose in action, in a charge, in an action by the daughter to recover a balance due to her, as a gift in futuro, was not prejudicial to the son. *Ebel v. Piehl*, 134 Mich. 220, 95 N. W. 1004, 10 D. L. N. 404.

(o-1) *Charge in action to recover taxes paid under protest.*

In an action to recover taxes paid under protest, on a question of whether the funds of plaintiff, a sanitarium association, comes under Comp. Laws 1897, chap. 224, were used wholly within the state, as required by sec. 6, the error, if any, in charging the jury that the burden of proving the funds were used without the state rested on defendant, was harmless, where all the testimony on the subject showed that the funds were properly used. *Michigan Sanitarium & B. Ass'n v. City of Battle Creek*, 138 Mich. 676, 101 N. W. 855, 11 D. L. N. 719.

(p-1) *Instruction that ice on the streets did not create liability for accidents.*

Where, in an action against a city for injuries sustained from a defective street, plaintiff did not claim that the city was liable because of an unnatural accumulation of ice, but the city claimed that the streets were covered with ice, that the horse of the traveler injured was smooth-shod, and that, because of these conditions the accident happened; an instruction that ice on the streets coming from natural causes did not create a liability, and if such ice caused the accident there could be no recovery,

was not prejudicial to the city. *Warn v. City of Flint*, 140 Mich. 573, 104 N. W. 37, 12 D. L. N. 294.

(q-1) *Instructing jury to pass on credibility of uncontradicted testimony.*

It was not prejudicial error for the court to instruct the jury that he would submit uncontradicted testimony, so that they might pass on the credibility thereof, when the testimony was in fact not wholly uncontradicted. *Rhode v. Insurance Co.*, 132 Mich. 503, 93 N. W. 1076, 9 D. L. N. 682.

(r-1) *Erroneous charge as to compensation of executor cured by jury not fixing same.*

On an appeal to the surrogate court from an order on an executor's accounting, an instruction that he is entitled to \$1.50 per day for time spent in the service of the estate, instead of \$1.00 per day, as fixed by How. Ann. Stat., sec. 9015. is harmless, where the jury found the number of days spent, but did not fix the per diem. *Quinn v. Sullivan*, 120 Mich. 365, 79 N. W. 570, 6 D. L. N. 173.

(s-1) *Erroneous charge that there was evidence of marriage by reputation.*

Where the evidence showed conclusively that no marriage contract existed, it was error without prejudice to charge that there was evidence tending to show marriage by general reputation. *Hemimway v. Miller*, 87 Minn. 123, 91 N. W. 428.

(t-1) *Charge giving an incomplete but not misleading statement of the law to the jury.*

A statement of the law in a charge to the jury, although incomplete and incorrect, is not ground for re-

versal where, as applied to the evidence it could not have misled the jury, and from their finding it is apparent that the error was harmless. *Beebe v. Wilkinson*, 30 Minn. 548, 16 N. W. 450.

(u-1) *Charge to the jury on an unnecessary point in the case.*

The fact that the court charged the jury upon an unnecessary point, it appearing that appellant could not reasonably have been injured thereby is not ground for a new trial. *Ames v. R. Co.*, 12 Minn. 412 (Gil.) 295.

(v-1) *Erroneous but immaterial instruction as to self-defense.*

Where, in a civil action for assault and battery, defendant justifies the use of force on the ground of self-defense, and his own evidence does not justify him in striking plaintiff, it is immaterial whether or not the trial court correctly instructed the jury as to the law of self-defense. *Germolus v. Sausser*, 83 Minn. 141.

(w-1) *In action by married woman for personal injuries, jury instructed not to consider medical attention or servant hire.*

Where, in an action by a married woman for personal injuries, the court instructed that they should not consider medical attention or servant's hire, as an element of damages, the error in permitting questions as to such matters was harmless. *Allen v. City of Springfield*, 61 Mo. App. 270.

(x-1) *Instruction basing recovery outside of allegations of petition.*

In action on a written guaranty, the plea being non est factum, the instruction was not formulated correctly,

in that it did not, in terms, place the right of recovery on the ground of ratification, rather than on the ground that defendant's subsequent conduct amounted to a new promise, upon a sufficient consideration, the new promise not being sued on in plaintiff's petition. Held, that the informality of the instruction could not be prejudicial. *Baskin v. Crews*, 66 Mo. App. 22.

(y-1) *Erroneously instructing jury that article required to be tested.*

Where, in an action to recover on a contract for the manufacture of a patented article, the proof on both sides showed that the article proposed to be manufactured had been tested, the error in instructing that the burden was on plaintiff to show, by a preponderance of the evidence that the article had been tested, was harmless. *Wiseman v. Culber*, 121 Mo. 14, 25 S. W. 540.

(z-1) *Instruction requiring storekeeper to keep the trap-door in a reasonably safe condition.*

Any error in an instruction, in an action for injury to a customer in a store from falling down the cellar stairs (the trap-door being open), in declaring that the occupant of a store must keep it in a reasonably safe condition, instead of stating that he must use ordinary care to keep it reasonably safe, is harmless, the facts which the instruction requires to be found, that plaintiff may recover, showing that defendant used no care to keep the premises safe, and that contributory negligence is the only defense. *Kean v. Schoening*, 103 Mo. App. 77, 77 S. W. 335.

(a-2) *Instruction requiring city to place guard rail or barricade about a street excavation, etc.*

Any error in an instruction requiring a city both to

place a guard rail or barricade about a street excavation, and to place lights along its sides, is harmless, where there is no evidence that either precaution was taken to prevent the injury. *Campbell v. City of Stansberry*, 105 Mo. App. 56, 78 S. W. 292.

(b-2) *In action for damages from grading, instruction that evidence of experts "and others" concerning value of plaintiffs' lot, before and after grading, might be taken into consideration.*

In an action for damages to real estate by the grading of streets so as to deprive the plaintiffs of access to their property, where the court instructed that evidence of experts "and others" concerning the value of plaintiffs' lot, before and after grading, and the actual damage done thereby, was not binding on the jury; but that the jury might apply their own judgment and knowledge as to such values and damage, in arriving at their verdict, in connection with the testimony offered in the case at the trial, the words "and others" were superfluous and non-prejudicial. *Restetsky v. Delmar Ave. & C. R. Co.*, 106 Mo. App. 382, 85 S. W. 665.

(c-2) *Error in instruction permitting recovery for medicines.*

Where, in an action for damages to plaintiff by reason of injuries sustained by his wife through defendant's negligence, the evidence was conclusive that plaintiff's items of loss and expenditures, other than the cost of medicines, which the jury might have believed from the evidence plaintiff had purchased for his wife's use exceeded the amount of the verdict, error, if any, in permitting a recovery for medicines, was harmless. *Abbitt v. St. Louis Transit Co.*, 104 Mo. App. 534, 79 S. W. 496.

(d-2) *Erroneous instruction undisturbed under doctrine of de minimus non curat lex.*

Where the amount recovered exceeded the amount sued for by only twelve cents, the fact that the instruction authorized the recovery of ninety-two cents more than the amount sued for, was a harmless error. *Cameron v. Hart*, 57 Mo. App. 142.

(e-2) *Instruction failing to limit recovery under each item to amount claimed not injurious to defendant.*

The court instructed that in assessing damages the jury might consider the several items specified in the petition, imposing no limit as to the amount which they were authorized to assess on account of each item, but limited the aggregate amount to the sum total of the items claimed by plaintiff. On appeal from a judgment for plaintiff, there was no claim that there was a finding in excess of the amount claimed by plaintiff for any specific item, or that the verdict was excessive. Held, that defendant was not injured by failure of the instruction to specifically limit the plaintiff's recovery under each item to the amount claimed therefor. *Blackwell v. Hill*, 76 Mo. App. 46.

(f-2) *Where in two trials verdicts have been for same party, careless language in instruction unaffffecting result will be disregarded.*

Where two trials have resulted in a verdict for the same party, and there is nothing to indicate that another trial will produce another result, the error in the instructions arising from careless language not affecting the result, does not justify a reversal under Burns's Annotated Statutes 1908, sec. 700, prohibiting the reversal of a judgment where the merits have been fairly tried. *Sullivan v. Hoopengartner* (Ind. App.), 96 N. E. 620.

- (g-2) *Where deceased lived near railroad crossing where he was killed, instruction requiring him to have used increased care commensurate with the increased danger.*

Where deceased lived in the community where he was killed, near an exceedingly dangerous railroad crossing; and must have been familiar with its surroundings and dangers, and must have known it was his duty to use a high degree of care to avoid injury there, defendant was not prejudiced by an instruction only requiring him to use increased care to avoid any danger to himself, commensurate with the increased dangers, if he knew that the crossing was unusually dangerous. *R. Co. v. Moss's Adm'r*, 142 Ky. 658, 662, 134 S. W. 1122.

- (h-2) *Instruction that "it was the duty of the master to give warning to an inexperienced servant of any unusual and hidden dangers."*

An instruction that it was the duty of the master to give warning to an inexperienced servant of unusual and hidden dangers, of which the master is aware, and of which the servant, to the master's knowledge, is ignorant, in an action against an employer for negligence in permitting a cave-in, in which there was no evidence that plaintiff was inexperienced, was not prejudicial, where the evidence showed that it was the duty of the employer, whether the servant was experienced or inexperienced, to keep the place of employment in a safe condition. *Brown v. Sharphouser Contracting Co.* (Cal. Sup.), 112 P. 874.

- (i-2) *When both parties to an action are natural persons, instruction directed to the testimony of but one of them.*

Where both of the parties to an action are natural

persons, error in giving an instruction directed to the testimony of only one of them will not reverse, where there is a clear preponderance of the evidence in favor of the prevailing party. *Wicks v. Wheeler*, 157 Ill. App. 578.

(j-2) *Immaterial misstatement in a court's summary of a party's contention.*

An immaterial misstatement of a party's contention in the court's summary is not ground for reversal. *R. Co. v. Kennedy*, 136 Ga. 440, 71 S. E. 740.

(k-2) *In action for loss by express company of diploma, instruction that if jury found for plaintiff, their verdict should be for a nominal amount.*

In an action against an express company for the loss of a medical diploma, error in an instruction, that if the jury found for plaintiff their verdict should be for an amount merely nominal was without prejudice, where the verdict was for defendant. *Whiteside v. Express Co.* (Neb. Sup.), 131 N. W. 953.

(l-2) *Instruction that if guard on machine was of a certain character the defendant would not be liable.*

An instruction that if the guard of a certain character was on the machine, the defendant would not be liable, being negative in character, was not prejudicial to defendant, though it imposed on him too high a degree of care. *Miller v. Cedar Rapids Sash & Door Co.* (Iowa Sup.), 134 N. W. 411.

(m-2) *Instruction that party putting witness on the stand is bound by his testimony.*

Instruction that a party putting a witness on the stand is bound by his testimony, though incorrect, held not ground for reversal. *Holliday v. City of Athens*, 10 Ga. App. 700, 74 S. E. 67.

- (n-2) *Instruction that the jury are the judges of the evidence and the court does not intend to tell them how they should find, etc.*

An instruction that, "Under the instructions of the court, the jury are the judges of the evidence in the case, and the court does not intend by any of the instructions given you in this case, to tell the jury how they should find as to any questions of fact in the case." Though not strictly accurate, in that it fails to tell the jury that they are the judges of the weight of the evidence, is not ground for reversal. *Grimm v. Donk Bros. Coal & Coke Co.*, 161 Ill. App. 101.

- (o-2) *Giving written instructions to the jury, after submission of the case.*

It is not reversible error to give written instructions to the jury, at their request, after the case has been submitted to them. *Freeman v. Freeman* (W. Va. Sup.), 76 S. E. 657.

- (p-2) *Instruction that if plaintiff, "knowingly or negligently" chose an unsafe way of doing the work, when a safe way was open to him, he could not recover.*

An instruction that if plaintiff "knowingly or negligently" chose an unsafe way of doing the work, when a safe way was open to him, he could not recover, was not objectionable as to defendant, because modified by the insertion of the words, "knowingly or negligently." *Aplegate v. R. Co.* (Mo. Sup.), 158 S. W. 376.

- (q-2) *In action for criminal conversation, instruction that previous lewdness would not defeat plaintiff's right of recovery, but would reduce the damages.*

In an action for criminal conversation, where there

was no evidence of the wife's lewdness up to her liason with defendant, the giving of an instruction that previous lewdness would not entirely defeat plaintiff in his right to recovery, but would reduce the damages, was not prejudicial to defendant. *Swearingen v. Bray* (Tex. Civ. App.), 157 S. W. 953.

(r-2) *Instruction referring to the presence of defendant in court room, and his failure to testify as a matter for the jury's consideration.*

Where plaintiff made out his case, and the evidence was uncontradicted, the court's reference in its charge to the presence of the defendant in the court room, and his failure to testify, as a matter for the jury's consideration, held harmless. *Brooks v. Bank* (Ga. Sup.), 81 S. E. 223.

(s-2) *Instruction calling attention to the total or partial loss of virility or masculine vigor, in action for personal injuries.*

An instruction on the measure of damages, in an action for personal injuries, which particularly calls attention to the "total or partial loss of virility or masculine vigor, if the evidence proves such loss," while not reversible error, calls attention to a feature likely to arouse prejudice and passion. *Loftus v. Illinois Midland Coal Co.*, 181 Ill. App. 197.

(t-2) *Instruction that contract modifying carrier's common law liability must be in writing.*

In an action for injury to goods by carriers, an instruction erroneously stating that a contract modifying a carrier's common law liability must be in writing was harmless, where no such contract was pleaded or proved. *R. Co. v. Schaefer* (Ind. App.), 90 N. E. 502.

- (u-2) *Where evidence on a point is conclusive and not contradicted it is harmless error to charge that the point is proved.*

Where evidence on a point is conclusive and uncontradicted, a statement in the charge that the point is proved, if improper, is harmless. *Cahill v. Dellenbeck*, 139 Ill. App. 320.

- (v-2) *In action against savings bank for paying deposit on alleged forged order, charge that relation between them was that of debtor and creditor.*

In an action against a savings bank for paying out deposit on orders claimed to have been forged, error in charging that the relation between the bank and a depositor was that of debtor and creditor, held not reversible. *Wood v. Bank*, 87 Conn. 341, 87 A. 983.

- (w-2) *In action for price of timber, charge that "plaintiff would be entitled to recover the value of the timber which the evidence satisfied you was cut."*

In an action for the price of timber cut by defendant or his agents, it was not reversible error to give a request by defendant, that "plaintiff would be entitled to recover the value of the amount of timber which the evidence has satisfied you was cut by defendant, by himself or his agent, and not paid for. If the plaintiff claims for more than was cut (if any was cut), but has not proved the whole amount claimed, yet if he has proved a certain amount was cut, then your verdict should be only for the amount that was proved," though confused and uncertain. *Harris v. Basden* (Ala. Sup.), 50 S. 321.

- (x-2) *Instruction covering a question upon which there is no evidence.*

An instruction covering questions on which there is

no evidence is harmless. *Traction Co. v. Ulrick* (Ind. App.), 90 N. E. 321.

(y-2) *Objection to charge on punitive damages too technical for consideration.*

The objection to an instruction on punitive damages, that the words, "or may not," should have been inserted after the words, "then you may," in the clause allowing an award of such damages, is too technical for consideration. *R. Co. v. Smith* (Ky. Ct. App.), 22 S. W. 806.

(z-2) *In charging the jury, reading pleading not supported by any evidence.*

It is not prejudicial error for the court, in charging the jury, to read a pleading not supported by any evidence, where he calls special attention to the issues having support in the testimony. *Frank v. Davenport*, 105 Iowa 588, 75 N. W. 480.

(a-3) *Erroneous instruction, when successful party entitled to peremptory instructions.*

If a peremptory instruction would have been justifiable for the successful party, erroneous instructions will not reverse. *Glass v. Traction Co.*, 144 Ill. App. 116.

(b-3). *In action for injuries to plaintiff, instruction that if defendant permitted the hole to remain for one week without inspection city was liable.*

In an action against a city for injuries to plaintiff through an improperly covered hole in a sidewalk, where the court instructed that the burden was on plaintiff to show that defendant knew, or by ordinary diligence might have discovered the defect, and that it had existed long enough before the accident for defendant to have known it, etc., a further instruction that if defendant permitted the hole to remain for one week, without inspec-

tion, it was liable, though erroneous, was not prejudicial to defendant, the evidence tending to show that the defect had existed for a much longer time than one week. *Revis v. City of Raleigh*, 150 N. C. 348, 63 S. E. 1049.

(c-3) *Charge that the court does not intimate what the contract was but whatever it was both parties are bound by it, and either violating it is liable to the other.*

In an action on a contract for the sale of lumber, it was not reversible error to charge that the court "does not intimate what the contract was, but whatever it was, both parties are bound by it, and either one violating it is liable for the violation, if any." *North Birmingham Lumber Co. v. Sims & White* (Ala. Sup.), 48 S. 84.

(d-3) *Court giving requested instruction as a part of the general charge.*

That the court gave requested instructions, as a part of the general charge, was not prejudicial to the party requesting the same. *Bailey v. Grand Forks Lumber Co.*, 107 Minn. 207, 119 N. W. 787.

(e-3) *In action for polluting well, instruction permitting recovery regardless of the course by which injurious substance reached the well.*

Where, in an action for damages for the pollution of a stream whereby a well on plaintiff's land was rendered useless, the petition alleged that the injurious substances were discharged in a stream which passed through the property of both parties, and from the stream reached the well, an instruction permitting recovery, without regard to the course by which the injurious substances reached the well in any other way. *Hayner v. Excelsior Springs Light, Power, Heat & Water Co.*, 129 Mo. App. 691, 108 S. W. 580.

(f-3) *Instruction that the effect of a vote of a town to grant land, and of an instrument purporting to be signed by the proprietors, was to convey their interest.*

The instruction that the effect of a vote of a town to grant land, and of an instrument purporting to be signed by the proprietors reciting that they give their right therein, was to convey their interest, if not strictly accurate, was not prejudicial, as though the instrument, not having been executed as required of conveyances of land, may not have been sufficient to convey the legal title, it having been given for an expressed consideration, conveyed an equitable title, which, will be presumed, later drew to it the legal title. *Foot v. Brown*, 81 Conn. 218, 70 A. 699.

(g-3) *In action for personal injuries, after instructing to meet views of plaintiff and defendant, court added, "Now let me come midway between them."*

In an action for personal injuries, and instructions that, "I have charged the law on both sides, and that means that counsel on each side have delivered the law according to their views of the facts, the plaintiff ascribing the defendant's duty his way, defendants ascribing the law to be their way, and states the law that way. If the facts are as plaintiff assumes you will find for him, and if as defendant assumes you will find for him, and "now let me come midway betwixt them," if error, was not prejudicial. *Plunkett v. Clearwater Bleaching & Mfg. Co.*, 80 S. C. 310, 61 S. E. 431.

(h-3) *Instruction that if jury believe from the evidence that plaintiff rendered service to deceased, upon request, plaintiff may recover therefor.*

The instruction, that if the jury believe, from the evi-

dence, that plaintiff rendered valuable services to deceased in her lifetime, at her request, which were not paid for, plaintiff may recover therefor, is not prejudicial, because specifying no particular time or kind of services, compensation for services for a certain period and of a certain kind, and no other being claimed, and all the evidence having reference thereto. *Eisiminger v. Stanton* (Mo. App.), 107 S. W. 460.

(i-3) *In an action by a servant for personal injuries, instruction that if the danger was obvious, and he "nevertheless took the risk," etc., he could not recover.*

In an action by a servant for personal injuries received by reason of defective machinery, the court charged that if the machinery was not in a reasonably safe condition, but was negligently permitted by defendant to be operated in a dangerous condition, and that if the jury believed that plaintiff knew of such unsafe condition, or that such condition was obvious to a person of ordinary prudence, and "nevertheless took the risk of being injured while at work about the machinery," he could not recover. Held, that the insertion of the words quoted, if error, was harmless. *Receivers of Kirby Lumber Co. v. Poindexter* (Tex. Civ. App.), 103 S. W. 439.

(j-3) *In action for assault, charge defining orders from master to servant.*

A charge that if defendant, the master, gave such servants orders to go through plaintiff's gate, and if, conforming to such orders was calculated to produce a difficulty, of which defendant knew, and if, in carrying out such instructions the servant assaulted complainant, defendant would be liable, was not prejudicial to defendant. *Miller Brent Lumber Co. v. Stewart* (Ala. Sup.), 51 S. 943

- (k-3) *Instruction that plaintiff must show that he had a contract with defendant, whereby plaintiff was to urge a third party to buy the property.*

Where, in an action by a broker for commissions, plaintiff showed that defendant agreed to pay a commission if he would see a third person and urge him to buy the property of defendant, and that he urged the third person who purchased the property, and defendant showed that the agreement provided that plaintiff would induce the third person to purchase, and that he did induce the third person to purchase, and the evidence justified a verdict for plaintiff, under either theory, an instruction stating that plaintiff must show that he had a contract with defendant whereby plaintiff was to urge the third person to purchase the property, and that if he failed to do so, he could not recover, was not so in conflict with an instruction referring to defendant's claim as to the nature of the contract, which was that plaintiff would induce a sale, as to justify a reversal of the judgment for plaintiff. *Tufree v. Saint* (Iowa Sup.), 126 N. W. 373.

- (l-3) *In action for putting down a tubular well, charge that the contract did not require a test by either party.*

Though the contract for putting down a tubular well did not require a test upon its completion, where the contractor volunteered to make the test, and the other party acquiesced, and the evidence was sufficient to justify a finding that the test was adequate, the other party to the contract was not prejudiced in an action for the contract price by a charge that the contract did not require a test by either party. *Snyder v. Crescent Milling Co.* (Minn. Sup.), 126 N. W. 822.

(m-3) *Instruction that on its face the assignment is her property and could be transferred only by her indorsement.*

There being no dispute that the written assignment sued on was the property of plaintiff, and no pretense that she had transferred it, any error in an instruction that, on its face, the assignment is her property and could be transferred only by her indorsement, was harmless. *R. Co. v. Odom* (Ala. Sup.), 53 S. 765.

(n-3) *In action by servant for personal injuries, charge "that the law does not, under any circumstances, exact from the servant the use of diligence in ascertaining certain defects."*

In an action by a servant for personal injuries, a charge, "that the law does not, under any circumstances, exact from the servant the use of diligence in ascertaining" certain defects, though erroneous as an abstract proposition, nor for the jury in all cases, was not prejudicial, where it stated the law under the facts of the case. *Maloney v. Winston Bros.*, 18 Ida. 740, 757. 111 P. 1080.

(o-3) *Instruction erroneous as to matters on which there is no dispute, but which correctly states the law as to testimony received.*

An instruction that may contain an erroneous statement of law as to matters on which there is no dispute, but correctly states the law as to testimony that was received, is an error without prejudice. *Castagno v. Carpenter*, 14 Col. 524, 24 P. 392.

(p-3) *Instruction summing up the facts and directing the jury to find for the plaintiff, if they find so.*

It is no ground for reversal that the jury are instructed to find for the plaintiff, if they find so, the instruction

summing up the facts assumed to be necessary to support the action, where no material fact necessary to a right to recover is omitted, although the practice of so framing an instruction is not approved. *R. Co. v. Eggmann*, 170 Ill. 538.

(q-3) *In affiliation proceedings, instruction to disregard child's appearance cured misconduct of jury.*

Misconduct of the jury in inspecting out of court the countenance of a child in affiliation proceedings is cured by an instruction to the jury, that they must not take the child's appearance into consideration. *La Mott v. State, ex rel. Lucas*, 128 Ind. 123, 27 N. E. 346.

(r-3) *Court inadvertently gave defendant's instructions to the jury, and, on discovering mistake, cautioned them to treat all alike.*

The court inadvertently gave to a retiring jury a copy of the instructions given at defendant's request, and did not discover the mistake until the jury had been out twelve hours, when he immediately informed the counsel, and the jury were recalled and the copy taken from their possession, with an instruction to give all instructions equal weight; and the jury, after deliberating three hours, returned a verdict for defendant. Held, that, as there was no misconduct, but merely an irregularity, and as it did not appear whether or not the jury had read the instructions the verdict would not be set aside. *Jones v. Austin*, 26 Ind. App. 399, 59 N. E. 1082.

(s-3) *Admission of answer to incompetent question cured by an instruction to the jury to disregard the testimony objected to.*

Error in admitting an incompetent question to be put to a witness and answer subject to objections from the other side, is cured by an instruction to the jury to dis-

regard the testimony objected to. *Coughlan v. Poulson*, 2 McArthur (D. C.), 308.

(t-3) *In action for assault and battery, erroneous instruction as to justification.*

In an action for assault and battery, where the defense of son assault demesne is not specially pleaded, but evidence in justification is admitted, without objection, an erroneous instruction as to what would amount to justification is harmless. *Norris v. Casel*, 90 Ind. 143.

(u-3) *Harmless error in instruction regarding sale of poisonous drug.*

In an action against a druggist for a negligent sale of acetanilide, where phosphate of soda was called for, error in an instruction, ignoring the element of contributory negligence, was harmless, where the jury necessarily found that plaintiff knew nothing about the appearance of either drug, and believed the dose she was taking was phosphate of soda. *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600.

(v-3) *Erroneous instruction not involving facts found by the jury.*

There is no available error in giving erroneous instructions as to the law of the case, provided the jury find certain facts, if the record shows that such facts were not shown. *Renan v. Meyer*, 84 Ind. 390.

Sec. 184. Instructions invading the province of the jury.

(a) *Instruction commenting on the evidence.*

In an action against a city for personal injury resulting from the negligence of the superintendent of streets, the court charged that paragraph five of the complaint al-

leged that plaintiff filed a claim required by the ordinance and charter, in order to prosecute the action, "but without objection, and I imagine there is no evidence to the contrary which has been admitted . . . before you. There has been put . . . a copy of a claim, which shows that as . . . the claim was presented, but it was, of course, in the ordinary formal pleading papers denied, but you need not waste any time on that." The pleading made a filing of the claim and used it, but it was not used at the trial, and the undisputed testimony showed that the claim was filed, and a copy thereof was introduced without objection. Held, that any irregularities in the instruction as being a comment upon the evidence, contrary to the Constitution, art. 4, sec. 16, was not prejudicial to defendant. *Hewitt v. City of Seattle* (Wash. Sup.), 113 P. 1084; *Canover v. Carpenter* (Wash. Sup.), 106 P. 620.

(b) *Instruction expressing opinion on the weight of the evidence.*

Where the charge of the court amounts to an expression of opinion upon the weight of the evidence, it is not error. *Castner v. Sliker*, 33 N. J. L. 96, 507; *Burch v. Carter*, 32 N. J. L. 554.

Sec. 185. Instruction not based on the evidence.

(a) *Erroneous charge upon a state of facts unsupported by proof.*

In an action of replevin for a horse, it is argued that the charge to the jury is erroneous. The plaintiff's testimony showed that his horse was stolen from him in Nashville, in the latter part of the year 1863; that it was not seen again until found in the defendant's possession in 1867. The judge told the jury that if the horse was stolen from the plaintiff, that he would not thereby lose

his title, but could recover it if found; but if the plaintiff had sold or exchanged his horse, and it afterwards came into the possession of the defendant the plaintiff could not recover. Defendants argue that this is a charge upon a state of facts not in the record, and this is true, as there is no evidence that the plaintiff ever sold or exchanged his horse. It has been held that a charge upon a state of facts not in proof will be ground of reversal, if calculated to mislead the jury. But we have also held that we will not reverse upon a mere abstract proposition like this, if we can see clearly that it could not have misled the jury. We can not suppose that the jury predicated their verdict upon these propositions in the charge without a particle of evidence to authorize it. *Rexfore v. Pulley*, 4 *Baxter* (Tenn.) 364; *R. Co. v. Hays*, 11 *Lea* (Tenn.) 382; instructions not shown to have been prejudicial, although not based on any evidence, *R. Co. v. Svedborg* (D. C.), 194 *U. S.* 201, 48 *L. ed.* 935; *R. Co. v. Godkin*, 104 *Ga.* 655, 30 *S. E.* 378; *Feckner v. Scarlett*, 29 *Ind.* 154; *R. Co. v. Hackney*, 39 *Ind. App.* 372, 77 *N. E.* 1048; *Parkhurst v. Mesteller*, 57 *Iowa* 474.

Sec. 186. Instructions on preponderance of the evidence.

(a) *Instruction on the preponderance of the evidence which told the jury that it could not be determined solely by the number of witnesses, etc.*

An instruction on the preponderance of evidence which told the jury that it could not be determined alone by the number of witnesses, and that they should take into consideration the opportunities of such witnesses for knowing the facts about which they testified, is not so erroneous as to demand reversal. *Lyons v. R. Co.*, 258 *Ill.* 75, 101 *N. E.* 211, *rev. judg.* 171 *Ill. App.* 374.

- (b) *Instruction that preponderance of evidence means the greater weight; and does not necessarily mean the greater number of witnesses.*

The giving of an instruction, in an action for civil damages for the illegal sale of intoxicating liquor, that the preponderance of evidence means the greater weight of evidence, and does not necessarily mean the greater number of witnesses, while not to be commended, is not reversible error. *Terre Haute Brewing Co. v. Ward* (Ind. App.), 102 N. E. 395.

- (c) *Charge on preponderance that if the jury find the evidence so evenly balanced that they "can not say upon which side the 'clear' preponderance or greater weight lies," their verdict should be for defendant.*

In an action on a claim filed in the probate court, the court instructed that if the jury find that the evidence preponderates in favor of defendant, they should return a verdict for defendant, and if they find it so evenly balanced that they "can not say upon which side the 'clear' preponderance or greater weight lies," their verdict should be for defendant. Held, that as the evidence justifies the verdict of the jury, the case should not be reversed for error in the use of the word "clear." *Draper v. Peteen*, 147 Ill. App. 164.

- (d) *The court using "fair" in charging as to preponderance of the evidence.*

There being practically no conflict in the testimony, judgment for plaintiff will not be reversed because of the use of the word "fair" in the course of an instruction that plaintiff must prove defendant's negligence by the "fair preponderance of the evidence," even if this requires a less degree of proof than would the word "preponderance" alone. *Reimer v. Wilson* (Col. Sup.), 93 P. 1110.

Sec. 187. Instructions on requiring defendant to furnish safe appliances and safe places to work.

(a) *Inaccuracy in charge as to defendant's duty to provide a safe place to work.*

A statement in the charge, in an action by a servant for a personal injury, that it was defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, while technically inaccurate, and because it failed to limit the requirement to a "reasonably" safe place, did not constitute prejudicial error, where it was so explained by the context that the jury could not have been misled; and, especially, where defendant practically admitted that the place where plaintiff received his injury was not reasonably safe, and denied having sent him there for that reason. (Colo.) *Portland Gold Min. Co. v. Flaherty*, 111 F. 312, 49 C. C. A. 361; instruction imposing absolute duty instead of using diligence to provide a safe place to work, *Taylor v. Atchison Gravel, Sand & Rock Co.*, 90 Kan. 452, 135 P. 576; instruction requiring defendant to furnish and maintain safe appliances and premises, *Fox v. Jacob Dold Packing Co.*, 96 Mo. App. 173, 70 S. W. 164; master's duty to furnish a reasonably safe place to work and reasonably safe machinery, *Brough v. Baldwin*, 108 Minn. 239, 121 N. W. 1111.

(b) *Erroneous instruction making it the absolute duty of master to provide reasonably safe appliances.*

An instruction making it the absolute duty of the master to provide reasonable and safe appliances, instead of to use reasonable care to furnish such appliances, is erroneous; but the error is harmless, where the defect complained of is so obvious and of such long standing that the failure to remedy it was manifest negligence. *Peirce v. Clavin* (Ill.), 82 F. 550, 87 C. C. A. 227.

- (c) *Instruction that a master is bound to use ordinary care to furnish a staging reasonably safe, and if he fails, and plaintiff is, without negligence, injured, master is liable.*

An instruction that the master was bound to use ordinary care to furnish a staging reasonably safe, and that, if he failed to perform this duty, and furnished an unsafe staging, and that plaintiff, without negligence, and in ignorance of its condition, went on the staging, and by reason of the defect was injured, the master was liable, though erroneous, as assuming that defendant was under a legal duty to furnish a scaffold as a completed structure, was not prejudicial, where the jury found that defendant instructed a carpenter to build the staging and undertook to become responsible for the safe building thereof. *Lang v. Bailes* (N. D. Sup.), 125 N. W. 891.

Sec. 188. Instruction referring jury to the pleadings and quoting statutes to them.

- (a) *Instruction that plaintiff may recover if the case was proved as alleged in the declaration.*

An instruction that plaintiff may recover if the case was proved as alleged in the declaration, is not reversible error if the declaration contains necessary allegations for recovery, though the practice of giving such an instruction is not to be commended. *Belskie v. Dering Coal Co.*, 246 Ill. 62, rev. judg. 151 Ill. App. 85; instruction referring the jury to the declaration for a statement of the negligence charged. *Freeze v. Harries*, 162 Ill. App. 118.

- (b) *Instruction in action for injury to miner, quoting the statute as requiring the examiner to measure the amount of air passing in the last cross-cut, etc.*

Under the statute requiring the mine examiner to

measure the amount of air passing in the last cross-cut, etc., an instruction for injury to a miner, quoting the statute as requiring the examiner to measure "the amount of air passing in the last cross-cut," etc., was not prejudicial error. *Colesar v. Star Coal Co.*, 255 Ill. 532, 99 N. E. affm'g judgm't 160 Ill. App. 251.

(c) *In action on contract, instruction that defendant's plea of payment admitted the contract.*

In an action on a contract, an incorrect instruction that defendant's plea of payment admitted the contract was harmless, where the existence of the contract was admitted throughout the trial. *Sayles v. Quinn* (Mass. Sup.), 82 N. E. 713.

(d) *Instruction making erroneous reference to petition that carrier's pens were not reasonably safe.*

Reference in the pleadings to an instruction submitting to the jury whether stock delivered for shipment died by reason of the carrier's pens not being reasonably safe, "as stated in plaintiff's petition," is harmless, the other instructions fully defining the issues. *Lackland v. R. Co.*, 101 Mo. App. 420, 74 S. W. 505.

Sec. 189. Instructions relating to brokers and commissions.

(a) *Instructions relating to commissions for the sale of real estate.*

On an issue as to amount of commissions due to a real estate broker for effecting a sale of his principal's building, the consideration paid the principal was in issue. The broker claimed that he was to receive all purchase money over \$31,000, and that the consideration was \$35,000; but the principal claimed that the original contract had been changed, whereby the broker was only

entitled to a commission of two and one-half percent on the consideration, which was \$30,000. Held, that an instruction that if the original agreement was abandoned, defendant should recover at least \$750, and if the consideration actually received by the principal was more than \$30,000, a commission should be allowed on the actual selling price, was not prejudicial to the broker, but favorable to him. *Yore v. Meshow*, 146 Mich. 80, 13 D. L. N. 672, 109 N. W. 35.

(b) *In an action by broker for commission, instruction that permitted a recovery if the owner knew the agent was in the broker's service.*

In an action by a broker employed to procure a purchaser of a farm for his commission the evidence showed that an agent of the broker procured a purchaser to purchase the farm for a specified sum, which reduced the commission to which the broker was entitled under the contract. The owner defended on the ground that he was led to believe that the agent was not the agent of the broker, and that the purchaser was not the broker's customer. Held, that the instruction presenting a defense which permitted a recovery if the owner knew that the agent was in the broker's service, was not prejudicial to the broker. *Haven v. Tartar*, 124 Mo. App. 691, 102 S. W. 21.

(c) *In action by salesman for commissions, instruction for plaintiff regardless of whether the proposition was accepted.*

Where, in an action by a salesman for commissions on a sale, the evidence showed conclusively that the employer's proposition to sell was accepted by the buyer procured by the salesman, the defect in an instruction authorizing a verdict for the salesman regardless of whether the proposition was accepted or sale made, was

not prejudicial. Ark. Lumber & Contractor's Supply Co. v. Benson, 91 Ark. 392, 123 S. W. 356.

- (d) *Erroneous charge that plaintiff was entitled to all in excess of certain sum as commissions harmless when jury found no excess received.*

In an action for commissions agreed to be paid brokers in the sale of property, instruction relating to plaintiff's claim to the excess of the purchase money above the named sum, can not have prejudiced defendant, where the jury expressly found that no purchase money was received in excess of that sum. Wilson v. Everett (Colo.), 139 U. S. 616, 35 L. ed. 286.

- (e) *In action by broker for commissions, error in instructing that he should have produced a purchaser satisfactory to defendant.*

Where, in an action for a broker's commissions, it was conceded that the terms of the contract obtained from the purchaser secured were satisfactory to the defendant, and that he voluntarily executed the contract; an objectionable instruction, in that it required that plaintiff, in order to have a recovery, should have produced a purchaser who executed a contract "on terms satisfactory to the defendant" was harmless. Warson v. McElroy, 33 Mo. App. 553.

- (f) *In action for broker's compensation, error in instruction that before he could recover he must show that he found a purchaser and tendered the principal the price.*

In an action for broker's compensation, error in instructing that before he could recover, he must show that he found a purchaser and tendered to the principal the price, instead of authorizing a recovery of the amount he could have earned within the time limited in the con-

tract, was not prejudicial to defendant. *S. Blumenthal & Co. v. Bridges* (Ark. Sup.), 120 S. W. 974.

(g) *Instruction as to commission for collecting money.*

In an action for money received, consisting of notes of an estate collected by defendant, of which he claimed fifty percent as a reasonable compensation, an instruction that, to find for plaintiff, the jury must not only find that the money was collected on a ten percent basis as claimed by him, but also that a suit brought by defendant to collect another estate was not successful, being favorable to him was not prejudicial to defendant, for the latter suit was irrelevant to the present action. *Jenkins v. Clopton*, 141 Mo. App. 74, 121 S. W. 759; *Slagler v. Russell*, 114 Md. 418, 80 A. 164.

Sec. 190. Instructions relating to mines and miners.

(a) *Instruction that defendant was required to keep the roof of a mine entry in a reasonably safe condition.*

Where the court instructed the jury that the defendant was required to keep the roof of the mine entry in a reasonably safe condition, while erroneous, for its duty was only to exercise reasonable care to so maintain it, it was only technical and harmless. *Peloni v. Smith-Love Coal Co.* (Iowa Sup.), 131 N. W. 685.

(b) *Erroneous instruction as to duty to guard the mouth of a mine.*

An instruction made it the duty of defendant to guard the mouth of a mine so as to make it reasonably safe, is harmless where the insufficiency of the guard of the mouth of the shaft does not appear to have been the cause of the action, but rather the reckless conduct of defendant in allowing boys to use the cars for their

amusement. *Knight v. Sadtler Lead & Zinc Co.*, 91 Mo. App. 574.

(c) *In miner's action for injuries from poisonous gases, instruction that though plaintiff knew of the foul air, if defendant assured him it was pure, he could rely on such assurance.*

In a coal miner's action for injury from poisonous gases claimed to have been accumulated in a mine, caused by defendant's failure to take precautions required by statute and keep the mine free from impure air, the court instructed, that though plaintiff knew of the foul air when he was placed at work, and of the resulting danger, if he notified defendant of such conditions, and defendant's manager directed plaintiff to work at the place, and assured him that the air was pure, plaintiff could rely upon such assurance. The evidence showed that plaintiff did not, at any time, report to the manager that the air was bad, but when he was put to work there the manager told him that it was the best air in the mine, and he thereafter continued to work in the same place for two months. Held, that the error in giving the instruction was not prejudicial to defendant, the bad air permitted in the mine, contrary to statute, being a risk which plaintiff did not assume. *Thayer's Est. v. Kitchen*, 145 Ky. 554, 140 S. W. 1052.

Sec. 191. Instructions relating to the relative values of affirmative and negative testimony.

(a) *Instruction relating to the relative value of affirmative and negative testimony.*

The giving of an instruction containing a reference to affirmative and negative testimony, though improper, because inapplicable to any testimony in the case, was not prejudicial. *Vance v. Monroe Drug Co.*, 149 Ill. App. 499.

Sec. 192. Instructions right though reasons wrong.

- (a) *Instructions right, though reasons wrong, will be affirmed.*

It would seem that the instruction appealed from will be affirmed, if right, though the reasons given for it by the inferior court were wrong. *Chapman v. Dixon*, 4 Harris & Johnson (Md.), 527.

Sec. 193. Instructions submitting issue of concurring causes.

- (a) *Where plaintiff, while driving a blind horse, fainted on a bridge and horse walked off it, instruction submitting issue of concurring causes.*

Where plaintiff, while driving a gentle, blind horse, fainted as he got on the bridge, and the horse walked off the unguarded approach, an instruction submitting the issue of concurring causes held not prejudicial to defendant. *Magee v. Jones County* (Iowa Sup.), 142 N. W. 957.

Sec. 194. Instruction submitting purely technical question.

- (a) *Instruction submitting purely technical questions to jury.*

Where an instruction leaves it to the jury to determine the question whether the instrument sued on is a note, and the question is wholly immaterial to the issue, and is purely technical under Wag. Statutes, p. 1036, sec. 19. relating to jeofails, such instruction will not authorize a reversal of the case. *Lee v. Dunlap*, 55 Mo. 454.

Sec. 195. Instruction that jury have the right to discard such parts of testimony as they deem unworthy of credit, or all of it.

(a) *Instruction that if defendant testified falsely in any respect the jury might reject all his testimony.*

An instruction that if defendant testified falsely in any respect, on the trial, the jury might reject all his testimony, is not ground for reversal, since it must be presumed that the jury would understand the instructions to refer only to wilful falsehood, and not to innocent misstatements. *Allard v. Lamirande*, 29 Wis. 502.

(b) *Instruction that the jury, as judges of the weight of evidence and credibility of witnesses, have the right to discard such parts of testimony as they deem unworthy of credit, or all of it.*

No error was committed in giving the following instruction: "The jury are the sole judges of the weight of the evidence and the credibility of the witnesses, and where the testimony is conflicting, it is your duty to reconcile it, if you can, upon the theory that such witnesses have sworn to the truth, but if you can not do so, then you are privileged to discard so much or such parts of it as you deem unworthy of credit. *R. Co. v. Beazley*, 54 Fla. 311.

Sec. 196. Instruction that servant does not assume risk, where master fails to comply with statute.

(a) *Instruction in servant's action based on failure to provide an exhaust fan, that servant does not assume the risk from master's non-compliance with a statute.*

An instruction, in a servant's action based on failure of the master to provide an emery wheel with an exhaust fan, that if the machine at which a servant works, is one required by statute to be guarded in a certain way or

equipped with certain attachments; he does not assume the risk from non-compliance of the master with the statute, could not have misled by inclusion therein of the words, "guarded in a certain way." *Indianapolis Foundry Co. v. Lackey* (Ind. App.), 97 N. E. 349.

Sec. 197. Instruction using the phrase, "and you should so find."

(a) *Use of the phrase, "and you should so find," in an instruction.*

The use of the phrase, "and you should so find," in an instruction, stating the conditions under which the plaintiff would be allowed to recover, did not constitute such error as required a reversal. *Steckler v. R. Co.*, 151 Ill. App. 368.

Sec. 198. Interrogatories.

(a) *Error in the form of interrogatory to the jury.*

As under the express provision of laws 1909, p. 205, chap. 192, it must affirmatively appear, to render a judgment reversible, that error therein has affected the substantial rights of the party complaining, the error in the form of an interrogatory to the jury, whether defendant knew or in the exercise of ordinary care should have known of a danger, was not prejudicial, where there was no evidence that the defendant had positive knowledge. *Berger v. Abel & Sach Co.*, 141 Wis. 321, 124 N. W. 410.

(b) *Incorporating interrogatories in special verdict requiring jury to state conclusions of law.*

Incorporating in a special verdict interrogatories requiring the jury to state conclusions of law is not prejudicial, as the verdict will be upheld only if containing facts sufficient, after eliminating improper matters, to sustain the judgment. *R. Co. v. Cheek*, 152 Ind. 663, 53

N. E. 641; R. Co. v. Ostrander, 116 Ind. 259, 15 N. E. 227; Lautman v. Miller, 158 Ind. 382, 63 N. E. 761.

(c) *Error in refusing to submit interrogatories where answers could not have affected the general verdict.*

Error of the court in refusing to submit certain interrogatories harmless, where the answer to the interrogatories could not have affected the general verdict. R. Co. v. Noel, 77 Ind. 110; Veidy v. Littlejohn (Iowa Sup.), 125 N. W. 198; Gordon v. Eans, 97 Mo. 587, 4 S. W. 112, 11 S. W. 64, 370.

(d) *Refusal of interrogatory as to whether plaintiff had proved that car was standing still when she attempted to alight.*

In an action for injuries alleged to have been sustained owing to the sudden starting of the car while she was attempting to alight, defendant requested the submission of an interrogatory as to whether plaintiff had proved by a preponderance of the evidence that the car was standing still when she attempted to alight, which interrogatory was refused, but one was submitted, as to whether plaintiff could, by the exercise of ordinary care, have avoided the injury, which was answered in the negative. Held, that such interrogatory covered, in substance, the one refused, so that defendant was not prejudiced by the refusal. R. Co. v. Foster, 226 Ill. 288, 80 N. E. 762, affm'g judg. 128 Ill. App. 571.

(e) *In submitting interrogatories to the jury, the court said, "the defendant requests the interrogatories."*

In submitting interrogatories to the jury to be answered, the court said, "The defendant requests the interrogatories," following which were the interrogatories. Held, as to the contention that interrogatories are presumed to come from the court, and the use of the

expression, "the defendant requests," was prejudicial to defendant, that while the expression was open to criticism, it was not ground for reversal. *Terre Haute Traction & Lighting Co. v. Payne* (Ind. App.), 89 N. E. 413.

(f) *Conflicting special interrogatories held immaterial.*

Conflict in special interrogatories held immaterial, in view of the fact that the jury answered in the affirmative whether the railroad was in repair and properly equipped with spark arresters. *M. H. Wolfe & Co. v. R. Co.* (Tex. Civ. App.), 144 S. W. 347.

(g) *Refusal of court to instruct that if jury returned a general verdict it was their duty to answer submitted interrogatories.*

Where the jury returned with their general verdict answers to interrogatories submitted to them, no harm resulted from a refusal of the court to instruct that it was their duty to answer the same in the event that they returned a general verdict. *Woollen v. Whitacre*, 91 Ind. 502.

(h) *Court's instruction that answers to special interrogatories might be "no evidence" or "not sufficient evidence," etc.*

The court charged, with reference to answers to special interrogatories, that if, as to any fact inquired, there was no evidence or not sufficient evidence as to such interrogatory, the jury should answer "no evidence," or "not sufficient evidence," or they might answer against the party having the burden of proof. The only answer to an interrogatory that was influenced by such instruction, in accordance with defendant's contention, was one which, had it been answered either affirmatively or negatively, would not have required judgment for defendant. Held, that such instruction, though not to be com-

mended, was not prejudicial to defendant. *Ind. & Nor. Traction Co. v. Newby* (Ind. App.), 90 N. E. 29.

- (i) *Answers to special interrogatories rendered errors in instructions unavailable.*

Errors in instructions unavailable where, from answer to special interrogatories, it appears they did not influence verdict. *Avery v. Moore*, 133 Ill. 74, 24 N. E. 606; *R. Co. v. Orr*, 84 Ind. 50; *Walsh v. Thompson* (Iowa Sup.), 3 N. W. 563; *Luke v. Johnnycake*, 9 Kan. 511; *R. Co. v. Short*, 41 Ind. App. 570, 83 N. E. 265.

- (j) *Failure of foreman of jury to sign answers to interrogatories.*

Where no objection was made to the jury foreman's failure to sign answers to special interrogatories before the jury was dismissed, such objection could not thereafter be made on appeal. *Perry-Mathews-Buskirk Stone Co. v. Smith*, 42 Ind. App. 413, 85 N. E. 784.

- (k) *Failure of the jury to return answers to special questions.*

It is no ground for reversal that the jury returned no answers to special questions as to facts that were purely collateral, and were not involved in the real issues. *Toulman v. Swain*, 47 Mich. 82, 10 N. W. 117.

- (l) *Failure of jury to answer improper questions for special findings.*

When, upon a trial to a jury, immaterial or improper questions for special findings are submitted to a jury, at the request of a party afterward complaining, and the jury is discharged without answering such questions, it is error without prejudice. *R. Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998.

(m) *Refusal to submit specific question to the jury.*

The refusal to submit specific questions to the jury is not ground for reversing the judgment, when it does not appear that the refusal was prejudicial to the party asking the submission. *Hamilton v. Shoaff*, 99 Ind. 63; *Dutzi v. Geisel*, 23 Mo. App. 676.

(n) *Where the jury disregarded all claims under a certain count refusal to submit special interrogatories thereon was harmless.*

Where, by their special finding, it appears that the jury disregarded all claims under a certain count, the refusal to submit special interrogatories as to such part of plaintiff's demands is harmless error. *R. Co. v. Dooley*, 32 Ill. App. 228.

(o) *Instruction that the jury should answer interrogatories submitted to them according to the weight of the "testimony."*

A statement in an instruction that the jury should answer interrogatories submitted to them according to the weight of the "testimony" relating to the facts inquired about, was harmless, though the word "testimony" is not as proper in meaning as the word "evidence." *Morgantown Mfg. Co. v. Hicks* (Ind. App.), 92 N. E. 199.

(p) *Insufficiency of answers to interrogatories not such error as would authorize a reversal.*

When interrogatories submitted to a jury were such that no answers which could have been made to them could have controlled the general verdict, when taken in connection with the answers returned to other interrogatories, the answers to such interrogatories do not constitute such error as would authorize a reversal on appeal. *Supreme Lodge K. of P. v. Edwards*, 15 Ind. App. 524, 41 N. E. 850.

- (q) *Where interrogatories are submitted relating to matters of an evidential nature, rather than to ultimate facts, and where some answers are, "don't know."*

Where interrogatories are submitted relating to matters of an evidential nature rather than to ultimate facts, no prejudicial error can be based on a verdict, in which some of the answers are merely the words, "don't know." Pullman Co. v. Washington, 30 O. C. C. R. 17.

- (r) *Refusal to instruct jury to return more definite answers to certain interrogatories.*

Error based on the refusal of an instruction directing the jury to return more definite answers to three interrogatories was harmless, where it appeared that if such interrogatories were answered as the exceptor claimed they should be, they would not, in connection with the remaining answers, show a state of facts entitling him to a judgment. Wolf v. Big. Creek Stone Co., 148 Ind. 317. 47 N. E. 664.

- (s) *Court not requiring the jury to reanswer interrogatories.*

The jury having returned an improper answer to the interrogatory, and being required to reanswer, returned the answer that the evidence was not sufficient to warrant an answer, it was not reversible error not to require them again to reanswer the interrogatory. South Shore Gas & Electric Co. v. Ambre (Ind. App.), 87 N. E. 246.

- (t) *Special interrogatories unanswered by the jury can not be complained of.*

The submission of special interrogatories can not be complained of, where they are not answered by the jury. Bauman v. National Safe Deposit Co., 124 Ill. App. 419; Cronin v. City of Holyoke, 162 Mass. 257, 38 N. E. 445; Wallace v. Skinner, 15 Wyo. 233, 88 P. 221.

- (u) *Assignments that answers to interrogatories were not sustained by the evidence, where different would not have required different judgment.*

Assignments that, the answers of the jury to certain interrogatories were not sustained by the evidence will not be reviewed, where the different answers supposable would not have produced such material conflict with the general verdict as to require a different judgment. *Inland Steel Co. v. Smith*, 39 Ind. App. 636, 75 N. E. 852, judgm't affm'd, 168 Ind. 245, 80 N. E. 538.

Sec. 199. Irrelevant instructions.

- (a) *Irrelevancy of the charge to any issue in the case.*

That the charge is not relevant to any issue in the case is not ground for reversal where no prejudice is shown. (Vt.) *Friedly v. Giddings*, 119 F. 438, judgm't affm'd, 128 F. 355, 63 C. C. A. 85, 65 L. R. A. 327; *McCullough Bros. v. Sawtelle* (Ga. Sup.), 68 S. E. 89; *Blake v. Hedges*, 14 Ind. 566; *Kemble v. Seal*, 92 Ind. 276; *Sullivan v. Finn*, 4 G. Greene (Iowa Sup.) 544; *City of Tacoma v. Nisquelly Power Co.* (Wash. Sup.), 107 P. 190.

Sec. 200. Measure of damages.

- (a) *Error as to measure of damages where plaintiff not entitled to recover.*

Erroneous instructions on the measure of damages are not ground of error, where the jury rejected the appellant's whole claim for damages. *Cotton v. Dexter*, 70 Ill. App. 586; *Pulliam v. Schimp*, 109 Ala. 184, 19 S. 428; *Hamilton v. Matlock*, 22 Ind. 47; *Richardson v. State, ex rel. Crow*, 55 Ind. 481.

- (b) *Erroneous instruction on the measure of damages not ground for reversal.*

The adoption by the court in its instructions of an erroneous measure of damages for breach of a contract, is not ground for reversal by defendant, where the result was that the judgment against it was smaller than it would have been had the correct rule been stated. (Pa.) *Hebron Mfg. Co. v. Powell Knitting Co.*, 171 F. 817, 96 C. C. A. 489; *Clause v. Bullock Printing Press Co.*, 118 Ill. 612; *Mountain v. Day* (Minn. Sup.), 97 N. W. 883; *Bridges v. R. Co.*, 6 Mo. App. 389; *Blewett v. R. Co.*, 72 Mo. 583; *Cowherd v. R. Co.*, 151 Mo. App. 1, 131 S. W. 755; *Powell v. Flechter*, 45 St. Rep. 294, 18 N. Y. Supp. 451.

- (c) *Erroneous instruction on the measure of damages in replevin.*

Any error in instructions as to the measure of damages in replevin was harmless, the jury having followed the correct rule, six percent per annum interest on the value of the property. *Sibeck v. McTiernan* (Ark. Sup.), 125 S. W. 136.

- (d) *Instruction on the measure of damages using the word "value" instead of "market value."*

Where, in an action for damages by delay, all of the evidence showed a depreciation in the value of the cattle at final destination where they were to be marketed, the use of the word "value" instead of "market value" in the instruction upon the measure of damages could not have harmed defendant, especially in the absence of a requested charge. *R. Co. v. Drahn* (Tex. Civ. App.), 143 S. W. 357.

- (e) *Error in abstract instruction as to measure of damages for injuries to crops.*

Error in an abstract instruction as to the measure of damages for injuries to crops was not prejudicial, when the crop in question was totally destroyed, and the jury obviously did not base the verdict on a partial destruction thereof. *R. Co. v. Cable*, 89 Ark. 518, 117 S. W. 550.

- (f) *In action by tenant for overflowing land, court charged that the measure of damages was the difference in the market value, with crops thereon, just before and immediately after the overflow.*

In an action by a tenant for overflowing land, the court incorrectly ruled that the measure of his damages was the difference in the market value of the land, with the crops thereon, just before the overflow and immediately after, but it appeared that in making estimates witnesses took into account nothing but the value of the crop, and plaintiff himself testified that there was no damage to the land. Held, that no prejudice resulted to defendant by the incorrect ruling, as the witnesses reached the same result in their estimates, though in an irregular way, as they would have reached if they had been permitted to testify to particular details along correct lines, and the jury had the benefit of the basis on which their judgment was formed, though the details of fact and data on which the witnesses founded their estimates of the crop was lacking, in large part owing to defendant's objections. *Wilson v. R. Co.* (Iowa Sup.), 121 N. W. 1102.

- (g) *In action for overflow of land, instruction on measure of damages that it was such sum as would compensate plaintiffs for actual injury.*

In an action for the overflow of land, on witnesses being asked to state how much the land had depreciated

by the injuries complained of, the court stated that the question was: What was the difference in the price of the land as it then was, and what it would have been if not injured? The court instructed that the measure of damages was such sum as would compensate plaintiffs for the actual injury to or destruction of the land due to the overflow. Held, that the attention of the jury having been directed by the court, in the examination of witnesses, to the proper measure of damages, and no instruction having been requested by defendant on the correct measure of damages, the instruction given and failure to state the correct measure of damages did not constitute reversible error. *R. Co. v. Ponder*, 31 Ky. L. R. 878, 104 S. W. 279.

(h) *In action for damages for loss of hand-painted china, charge that the measure of damages would be the reasonable value of the property.*

Where, in an action for damages for loss of hand-painted china, plaintiff was asked if it had no market value; "Please state in what manner and what personal value do you now place upon said china ware?" In answer to which plaintiff estimated the value at \$200, and the record showed that while this answer was based alone upon sentiment, plaintiff further testified that she used the china for ornamental purposes, and the court charged that the measure of damages would be the reasonable value of the property lost, and the jury returned a verdict for \$75; in view of the unfavorable instruction and the amount of the verdict, no substantial injury was done to defendant. *R. Co. v. Green* (Tex. Civ. App.), 97 S. W. 531.

(i) *Where recovery is not excessive error in instructions on the measure of damages is harmless.*

Where the recovery is not excessive, error in instruc-

tions on the measure of damages is harmless. *Kindal v. J. I. Porte Lumber Co.*, 69 Ark. 442, 64 S. W. 220; *R. Co. v. Flowers*, 108 Ga. 795, 33 S. E. 874.

(j) *Failure to expressly instruct on the measure of damages.*

The failure of the court to expressly tell the jury, as it should have done, that the measure of damages was the diminution in value of plaintiff's property by reason of the acts complained of, is not reversible error, as the instruction fairly conveyed that idea, and the ruling of the court, on the trial, clearly indicated to the jury the true criterion of recovery. *City of Louisville v. Bohlsen*, 22 Ky. L. R. 1864, 61 S. W. 1014.

(k) *Failure to instruct on the measure of damages.*

The failure of the court to instruct the jury as to the measure of damages presents a case of non-direction merely, which is not reversible error. It is the better practice to instruct the jury on the subject, as the measure of damages is always a question of law, but when the court fails to do so, causes can not be reversed for this reason alone. *Storck v. Mesker*, 55 Mo. App. 26.

(l) *Error in evidence on the measure of damages which did not affect the verdict.*

Error in evidence on the measure of damages is harmless, where the amount recovered shows that it did not affect the verdict or judgment. *Conway v. Fitzgerald*, 70 Vt. 103, 39 A. 634.

(m) *Erroneous charge on the measure of damages disregarded by the jury.*

Though the charge on the measure of damages was erroneous the jury disregarded it, and found upon the correct measure of damages, and the verdict is not disturbed. *R. Co. v. House*, 4 Tex. Civ. App. 263.

- (n) *Refusal to charge as to measure of damages for non-performance.*

Where a case was submitted to the jury, under instructions: that unless plaintiff had substantially performed the contract sued upon he could not recover, and the jury found for plaintiff, refusal to charge requests as to defendant's measure of damages, in case of non-performance is immaterial. *Smith v. Cowan*, 3 App. Div. 230, 73 St. Rep. 638, 38 N. Y. Supp. 482, affm'd, 157 N. Y. 714.

- (o) *Erroneous instruction on measure of damages, where uncontradicted and ascertainment a mere matter of computation.*

Where the testimony upon which damages were to be computed was uncontradicted, and the correct ascertainment of the damages was a mere matter of computation, a judgment would not necessarily be reversed because of an erroneous instruction on the measure of damages. *Heil v. R. Co.*, 16 Mo. App. 363.

- (p) *Failure to instruct on the measure of damages, where verdict is for substantial damages.*

Where, in an action for the breach of a contract, the verdict is for substantial damages, error in failing to instruct that the verdict should not be limited to nominal damages, or instruction that, if the jury could not fix a basis for recovery, the verdict should be nominal, is harmless. *Hitchcock v. Supreme Tent of K. of M. of the W.*, 107 Mich. 391, 65 N. W. 285.

- (q) *Erroneous charge as to measure of damages for failure to deliver logs.*

Defendants, who had a contract for saw-logs with plaintiff, claimed that by his failure to deliver the number

of logs agreed, they were damaged by losing the profits on the sawing. The court charged that if defendants could have obtained logs from other sources they could not permit the mill to remain idle in order to recover full damages. Held, that the charge was not prejudicial in omitting to state the efforts defendants were required to make to obtain other logs, since the court also charged that the plaintiff had the burden of showing that defendants could have obtained other logs, and plaintiff offered no testimony on that point. *Hopkins v. Sanford*, 41 Mich. 243, 2 N. W. 39.

(r) *In action for breach of contract, instruction that if plaintiff failed to manufacture and deliver the articles, defendant entitled to the difference between the price he was to pay and what he was to receive.*

In an action by a seller to recover an amount due from a purchaser, in which the purchaser reconvened for damages for failure to supply the articles sold on the day on which they were to be supplied, whereby the defendant was unable to comply with contracts which he had made to sell the articles, the evidence disclosed that each of the sales made by defendant was for a sum which the undisputed evidence showed to have been the market value of the articles. Held, that an instruction that if plaintiff failed to manufacture and deliver the articles contracted for, so that defendant could deliver the same, then defendant would be entitled to recover the difference between the price the defendant was to pay plaintiff and what defendant was to receive for the articles, was harmless error. *Weatherford Machine & Foundry Co. v. Tate* (Tex. Civ. App.), 109 S. W. 406.

(s) *Conflicting instructions on the measure of damages where following either the same result follows.*

Parties are entitled to know which of two conflicting

instructions as to damages was adopted; but if either rule would have led to substantially the same result the error is harmless, and not ground for a new trial. *Gustafson v. Rustemeyer*, 70 Conn. 125.

(t) *Insufficient instruction on measure of damages cured by reasonable assessment of damages.*

When the jury was not sufficiently instructed as to the measure of damages, but it appeared that their verdict was not beyond the just sum that plaintiff ought to recover as lawful damages; held, that the judgment should not be reversed. *Cooper v. R. Co.*, 44 Iowa 134.

(u) *In action for deceit in the sale of a violin, instruction that measure of damages was difference between price paid and actual value.*

In an action for deceit, it appeared that for the purpose of inducing the purchase of a violin for \$500, defendant falsely represented it to be a celebrated make and worth \$1,000. No proof of the value of a violin of such make was given. Held, that defendant was not prejudiced by an instruction that the measure of damages was the difference between the price paid and the actual value of the instrument, instead of the real and the represented value. *Powell v. Fletcher*, 18 N. Y. Supp. 451, 19 N. Y. Supp. 911.

(v) *Failure of jury to award interest cured error in charge as to the measure of damages.*

In an action to recover for hay destroyed by fire set by defendant's locomotive, an instruction that the measure of damages is the market value of the hay when burned, with interest from said time, is erroneous, in not leaving to the jury any discretion as to withholding or allowing interest, but is no ground of reversal, where it appears that the jury did not, in fact, allow interest.

Eddy v. Lafayette, 49 F. 807, 1 C. C. A. 441, affm'd, 163 U. S. 456 (Okl.), 41 L. ed. 225.

(w) *Improper evidence under erroneous theory of the measure of damages.*

Though improper evidence be received under an erroneous theory of the measure of damages, the error is not ground for reversal, if the actual recovery is in accordance with the correct rule. Moline Malleable Iron Co. v. York Iron Co. (Ill.), 83 F. 66, 27 C. C. A. 442.

(x) *Immaterial evidence admitted as to the measure of damages.*

Where immaterial evidence was allowed as to the measure of damages, but it appeared from the nature of the verdict that no prejudice resulted from its admission, the cause would not be reversed on account of such mere abstract error. Hubbard v. Mason City, 60 Iowa 400.

(y) *Erroneous evidence as to the measure of damages which did not affect the verdict.*

Error in the admission of evidence on the measure of damages is harmless, where the amount recovered shows that it did not affect the verdict or judgment. Williams v. Allen, 40 Ind. 295; Tel. Co. v. Rogers, 43 Ind. App. 306, 87 N. E. 306, 87 N. E. 165.

(z) *Refusal of court to charge as to the rate of damages cured by the verdict.*

The refusal of the court to charge the jury as to the rate of damages to be given is cured by a verdict for the same amount which the court would have instructed them to allow. Douglas v. McAllister (D. C.), 3 Cranch (U. S. Sup.) 298, 2 L. ed. 240.

Sec. 201. Misleading instructions.

(a) *Misleading and confusing instructions.*

An instruction claimed to be confusing and misleading, which does not affect the merits, is not reversible. Parrish v. R. Co., 140 Mo. App. 700, 126 S. W. 767.

(b) *Misleading instruction ignored by the jury.*

Where the jury, in finding damages for plaintiff, must have ignored a misleading instruction given at the request of defendant, such instruction is harmless as against plaintiff who appeals. F. W. Brockman Commission Co. v. Aaron, 145 Mo. App. 307, 130 S. W. 116; Hunt v. R. Co., 7 Ga. App. 375, 66 S. E. 1039.

(c) *Erroneous instruction must have been calculated to mislead the jury or produce a wrong result to reverse a judgment.*

Erroneous instructions to the jury to be made available on appeal must appear to have been material, or that they were calculated to mislead the jury, or produce a wrong result. Martin v. Hill, 3 Utah 157, 2 P. 62.

(d) *Instruction placing too great a degree of care on the city.*

Where it was conceded that a sidewalk upon which plaintiff was injured was out of repair, and had been for months, the condition being known to everybody, so that the city had failed in its duty to keep the sidewalk in repair, instructions overstating the degree of care required of a city in such respect were harmless error. Howard v. City of New Madrid, 148 Mo. App. 57, 127 S. W. 630.

Sec. 202. Modification of charge.

- (a) *Modification of an instruction, not affecting the meaning.*

The court will not reverse a judgment because of a modification in an instruction which in no way changed its meaning. *R. Co. v. O'Sullivan*, 143 Ill. 48; harmless modification, *Anderson v. Union Terminal Co.*, 81 Mo. App. 116.

- (b) *Modification which imposed a further condition upon the plaintiff's right to recover.*

A judgment will not be reversed because of a modification in an instruction for the defendant, where the modification merely imposes further conditions to the plaintiff's right to recover; the instruction is harmless. *R. Co. v. O'Sullivan*, 40 Ill. App. 369, cf. 143 Ill. 48 (above).

- (c) *In action for injuries from explosion of boiler, court adding to charge, "instead of suffering plaintiff to be exposed to the perils of an explosion."*

In an instruction to the effect that it was defendant's duty to have ascertained and remedied defects in the engine that had been used as long as was safe, without examination and overhauling, when such defects could have been ascertained and remedied by reasonable and ordinary care and prudence, "instead of suffering plaintiff to be exposed to the perils of an explosion," the conclusion, though unnecessary, is not prejudicial to defendant. *R. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724.

- (d) *Substituting the word "would" for "could" in a requested instruction as to the effect of employee assuming ordinary risks.*

Substituting the word "would" for "could" in a re-

requested instruction, to the effect that an employee "assumed" ordinary risks, not only usually known to him, but so far as they could have been known to him by the exercise of ordinary care on his part, and that, if he knew, or by the exercise of care and prudence could have known of the defect, he could not recover, is not reversible error. *Standard Oil Co. v. Brown* (D. C.), 218 U. S. 78, 30 S. Ct. 669, affm'g judgm't, 31 App. D. C. 371.

(e) *Court, before giving requested instruction, crossing out the clause stating that amount of commissions, if any, should be two percent of the value of the property.*

In a broker's action for commissions, where plaintiff was entitled to recover the usual commissions, the court, before passing the instructions to the jury, crossed out with a pencil a clause stating that the amount of the recovery, if any, should be two percent of the value of the property. Held, that the uncontradicted evidence showing that the usual commission was two percent, defendant was not prejudiced by the court's error in permitting the jury to understand what his own conclusion was. *Hess v. Mayes* (Iowa Sup.), 125 N. W. 671.

(f) *Instruction manifestly biased against defendant, where no modification was asked by injured party.*

In an action for damages the jury were instructed not to believe any extravagant statement of the injuries received by plaintiff, and that when they had made up their minds as to the amount really sustained, they should not be nice in the awarding of compensation, but that it should be liberal. Defendant did not request the instruction to be qualified or explained, or a different one given. Held, that the charge, in that respect, fur-

nished no ground for reversing the judgment. *Congress Empire Spring Co. v. Edgar* (N. Y.), 99 U. S. 645, 25 L. ed. 487.

(g) *The modification of a charge is not within the knowledge of the jury, and causes no confusion to them.*

There is no presumption that the jury have any knowledge of the requests to charge, except as they are communicated to them in the form of instructions, and the alteration of a request in a particular which might have confused the jury, if made with their knowledge, will not be treated as error where the request, as modified and given, was not erroneous, and it does not appear that the jury knew any modification of the request had been made. *Weimer v. Bunbury*, 30 Mich. 201.

(h) *Instruction modified by striking out the word "cash."*

The modification of a request to charge that the measure of damages was the cash value of the property, by striking out the word "cash," is not error on the record, which does not show that any two standards of value were placed before the jury. *Weimer v. Bunbury*, 30 Mich. 201.

(i) *Harmless failure to modify an instruction.*

Where the finding of the jury is, as it necessarily would have been had a certain instruction been modified as requested, the failure to modify will be error without prejudice. *Watheim v. Artz*, 70 Iowa 609; failure to modify improper instructions, *Henry C. Werner Co. v. Calhoun*, 55 W. Va. 246, 46 S. E. 1024.

(j) *Modification of charge that burden was on plaintiff to prove the injuries occurred solely by the stock being struck by a train.*

It appeared that one of the animals had a scratch on its nose, which witnesses testified "looked like it might

have been made by a barbed wire," that the injury was insignificant, that the animal was skinned and bruised on other parts of the body, and its injuries, and those of the other animals, indicated that they had been made by violent means, and there was no evidence that any of the injuries, except the scratch, was caused in any other manner than by the stock being struck by a train. Defendant requested an instruction that the burden was on complainant to prove that the injuries occurred solely by the stock being struck by a train, and that if some of the injuries might have occurred from any other cause, the jury should resolve such doubt in favor of the defendant, which the court modified so as to read, that the burden was on plaintiff to prove that the injuries occurred solely by the stock being struck by a train, and unless the jury so found plaintiff was not entitled to recover. Held that, on account of the nose scratch, the instruction should have been given as asked, but that the injury was so insignificant, the error in modifying the instruction was harmless. *Smith v. R. Co.*, 127 Mo. App. 160, 105 S. W. 10.

(k) *In action to recover salary, modifying instruction so as to apply to a deduction for a single item of expense.*

In an action by a servant to recover his salary, defendant having requested an instruction that there should be deducted from plaintiff's salary whatever was paid to other persons who took charge of defendant's business during plaintiff's absence, error, if any, in modifying such instruction so as to make it applicable to a single item of expense, was harmless, where there was no evidence that any other expense was incurred on account of such absence. *Reiter v. Standard Scale & Supply Co.*, 237 Ill. 374, 86 N. E. 745.

- (l) *Modification of instruction by running a line through the part stricken, instead of obliterating the same.*

A modification of an instruction by running a line through the part stricken, instead of obliterating, held not so prejudicial as to require reversal, especially when the same language was contained in an instruction given. *McGuire v. North Breese Coal & Mining Co.*, 179 Ill. App. 592.

- (m) *Court stating that modification was of a requested instruction.*

Where a requested instruction, as modified by the court, correctly applied the law to the facts, it was not reversible error for the court to state that the instruction was requested. *Anthony v. Cass Co. Home Tel. Co.* (Mich. Sup.), 130 N. W. 659, 18 D. L. N. 193.

Sec. 203. Modification of instructions.

- (a) *Where modification added nothing prejudicial it was not subject to objection.*

Where the court modified an instruction requested by the defendants before giving it to the jury, but did not add to it anything prejudicial to the defendants, defendants could not object to it. *Baker v. Borello*, 131 Cal. 615, 63 P. 914.

- (b) *Appellant can not complain of a modification of an instruction favorable to him.*

The modification of a proposition of law is not ground of error where, though erroneous as modified, but was still more erroneous as asked, and was, by the modification, left still too favorable to appellant by whom it was requested. *Alexander v. Emmett*, 68 Ill. App. 261, affm'd, 169 Ill. 523.

- (c) *Erroneous modification of instruction harmless where it did not influence the verdict.*

An erroneous modification of an instruction is not ground for reversal, where it is apparent that it did not influence the verdict. *Cleaves v. Stanley*, 34 Ill. App. 338.

- (d) *Defendant can not complain of instruction for plaintiff modified to be more favorable for defendant than warranted.*

Defendant can not complain of an instruction requested by plaintiffs, and modified by the court so as to be more favorable for defendant than is warranted. *King v. Rea*, 13 Col. 69, 21 P. 1084.

- (e) *In an action for injuries to passenger on street car, modification of charge as to superior right of street car to right of way.*

Where, in an action for injuries to a passenger on a street car, defendant requested an instruction that a street car has the right of way over that portion of the street on which it alone can travel, and if, therefore, a private vehicle, in traveling on the public highway meets with the street car, the vehicle must yield the right of way to the street car, a modification of the instruction so as to read, "If, therefore, a private vehicle traveling on the public highway meets with a street car, and there is no special reason to the contrary, the private vehicle must yield the right of way to the street car," was not prejudicial. *Doolin v. Omnibus Cable Co.*, 140 Cal. 369, 73 P. 1060.

Sec. 204. Naked direction of the court.

- (a) *A naked direction of the court unaccompanied with any statement of facts, where merely abstract and inapt to mislead the jury.*

The naked direction of a court, unaccompanied with

any statement of facts, can not support allegations of error; they may be, in reference to the facts, merely abstract or inapt to mislead the jury. *Rabe v. Wells*, 3 Cal. 148; *White v. Abernathy*, 3 Cal. 426.

Sec. 205. Narrowing charge to one issue.

(a) *Narrowing the charge to one issue.*

Where, in an action for injuries to a servant, the effect of a portion of the charge that, the only issue in the case was one of defective machinery, was to prevent a verdict for plaintiff, unless the jury found the injury resulted from defective machinery, and the jury could not have understood therefrom that they should disregard any of defendant's claims, defendant was not prejudiced thereby. *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 100 N. W. 396, 11 D. L. N. 246.

Sec. 206. Notations on instructions.

(a) *Notations on instructions indicating their subject matter.*

Notations on instructions to indicate their subject matter are not harmful, where the trial court certifies that they were not present when the instructions were given, and there is no proof as to who made them or when they were made. *Kelly v. R. Co.*, 175 Ill. App. 196.

Sec. 207. Not ordinarily reversible error to use improper words, or with broader meaning than intended.

(a) *Instructions erroneous from employing a wrong word.*

Where the court, in an action for malicious prosecution, instructed the jury that the statute limited the maximum amount of damages that could be recovered to a certain sum, stating the amount claimed in the complaint; held, that the use of the word "statute" instead

of "complaint" did not injure the defendant. *Fisher v. Hamilton*, 49 Ind. 341.

- (b) *Charge not misleading by employing the word "testimony" instead of "evidence."*

It is not ground for reversal that an instruction made use of the word "testimony" in place of evidence, it being improbable that the jury would make any technical distinction between the two words. *Jones v. Gregory*, 48 Ill. App. 228; *Mann v. Higgins*, 83 Cal. 66, 23 P. 206; *Morgantown Mfg. Co. v. Hicks* (Ind.), 92 N. E. 199.

- (c) *Instruction employing the word "possessed," in relation to skill, instead of "used" or "employed."*

In an action for services rendered defendants in settling an indebtedness due to a third party, an instruction that, in determining the value of plaintiff's services, the nature of the employment, etc., and the skill required of plaintiff, so far as skill was "possessed" by it, should be considered, was complained of, as authorizing the jury to consider the skill required, without reference to whether the skill was used or not. Held, that though the word "possessed" was inapt, and the word "used" or "employed" would have been better, such inaccuracy was unlikely to mislead the jury, and the evidence admitting of no conclusion but that skill was exerted by plaintiff, a judgment in its favor would not be reversed. *Rutledge & Kilpatrick Realty Co. v. Gartside*, 128 Mo. App. 580, 106 S. W. 1126.

- (d) *Inadvertently writing the word "guilty," instead of "given," on the margin of an instruction.*

The action of the court in inadvertently writing the word "guilty" instead of the word "given," on the margin of one of the instructions given to the jury, is not ground for reversal. where it appears from affidavits

filed upon a motion for a new trial, that the instructions were not handled or read in the jury room by any of the jurors except the foreman, that he read the instructions aloud to the jury, and did not read nor notice the marginal indorsement so inadvertently made. *Prussner v. Brady*, 136 Ill. App. 395.

(c) *Instruction employing the adjective "ordinary" to modify the adjective "prudent," instead of the adverb "ordinarily."*

An instruction that ordinary care means that care which an ordinary prudent person ordinarily exercises under similar circumstances was not prejudicially erroneous for using the adjective form "ordinary" to modify the adjective "prudent," instead of the adverb "ordinarily," since the jury must necessarily have understood the word as modifying or qualifying the next succeeding word, and could not have been misled thereby. *Gould v. Merill Ry. & Lighting Co.*, 139 Wis. 433, 121 N. W. 161.

(f) *Using the word "extraordinary," in a charge, in the sense of extraneous to the employment.*

Even if an instruction that a servant does not assume extraordinary risks was misleading, defendant, in a servant's injury action, was not prejudiced thereby, where the court used the word "extraordinary," in the sense of extraneous to the employment, and the issue was whether the risk was hidden and plaintiff was ignorant thereof, and was not warned of it. *Roberts v. Chemical Co.*, 84 S. C. 283, 66 S. E. 298.

(g) *Instruction employing the word "consent" for "consequence," through a clerical error.*

Use of the word "consent" instead of the word "consequence," in a portion of the court's charge, was not

ground for reversal, where it was obviously a mere clerical error which could not have misled the jury. *S. W. Tel. & Tele. Co. v. Davis* (Tex. Civ. App.), 156 S. W. 1146.

(h) *Instruction employing "peril" instead of "imminent peril," defining the right to choose between two dangers.*

In an employee's personal injury action, any error in using the word "peril" instead of "imminent peril," in an instruction defining his right to choose between two dangers, if he was placed in "peril" by defendant's negligence, was harmless error, where all the evidence showed that plaintiff was in great and immediate danger. *Frazier v. Foster & Danner*, 146 Ky. 76, 142 S. W. 216.

(i) *Inadvertent use of "or" instead of "and" in an instruction.*

The error in an instruction consisting of the use of the word "or" instead of "and." Held, in view of the other instructions given, not prejudicial. *R. Co. v. Martens*, 78 Mo. App. 74; *Wiedman v. Line*, 13 Ky. L. R. (abst.) 590.

(j) *Improper use of words, "If it further appear," in an instruction.*

An instruction which, after first requiring the jury to find certain facts, as a condition precedent to plaintiff's recovery, proceeded to state a number of other conditions, premising with the words, "if it further appear," was improper; but where there was no controversy in evidence touching the fulfillment of the subsequent conditions, defendant having admitted them, no harm could have resulted by this mode of statement. *Hanlon v. O'Keefe*, 38 Mo. App. 273.

- (k) *Instruction employing the words "greater care," instead of "increased care commensurate with the added danger," as to duty incumbent on decedent.*

Where decedent, whose passage over a railroad crossing, on which double tracks were laid, was impeded by a passing freight train on the farther track, stepped on the near track and was immediately struck and killed by a passenger train from the opposite direction, an instruction that if the decedent's view of the approaching train was obstructed by the freight train, she was bound to use greater care to learn of the approach of any train that might be coming, was not prejudicial to defendant in the use of the words "greater care," instead of "increased care commensurate with the added danger." *R. Co. v. Ward's Adm'r*, 145 Ky. 733, 141 S. W. 72.

- (l) *Instruction misemploying "two" for "due."*

In an action on a fire policy the court's instructions, "made two proofs of loss." The word "two" was evidently, by clerical error, used for "due." Held, that the error in the instructions did not constitute reversible error. *Burton v. Insurance Co.*, 96 Mo. App. 204, 70 S. W. 172.

- (m) *Charge improperly employing terms "farmers" and "plank road men."*

In a proceeding in quo warranto to forfeit the charter of a plank road company, for its failure to maintain its road in reasonable condition for public travel, the use by the court, in its charge to the jury, of the term "farmers," to indicate the witnesses for relator, and "plank road men," to indicate the witnesses for respondent, was unfortunate, as tending to prejudice the jury, but the error was not of sufficient importance to justify a reversal. *People, ex rel. Esper, v. D. & S. Plank Road Co.*, 131 Mich. 30, 90 N. W. 687, 9 D. L. N. 224.

- (n) *Instruction mentioning set-off as payment alleged to have been made.*

In an action involving a set-off, the fact that the court mentioned set-off as the payment alleged to have been made, is not ground for reversal. *Scheibeck v. Van Derbeck*, 122 Mich. 29, 80 N. W. 880, 6 D. L. N. 643.

- (o) *Inadvertent error in a charge which could not mislead the jury.*

An evident inadvertence in a judge's charge is not ground of error, if it could not have misled and was not noticed at the time. *Labar v. Crane*, 56 Mich. 585, 23 N. W. 323.

- (p) *"Etc." erroneously employed in an instruction.*

The use of the expression "etc." in an instruction defining actual malice as "actual ill-will, hatred, etc.," was harmless error, the meaning of the word "malice" being well understood. *Louisville Press Co. v. Tennyly*, 105 Ky. 365, 20 Ky. L. R. 1236, 49 S. W. 15.

- (q) *Use of the word "plaintiff" instead of "defendant" in a charge.*

The use of the word "plaintiff" in instructions, where "defendant" was intended, is not ground for reversal, where it could not have misled the jury. *Jumper v. Dobson*, 127 Ga. 544, 56 S. E. 514; *Salina Mill & Elevator Co. v. Hoyne*, 10 Kan. App. 579, 63 P. 660.

- (r) *Instruction using the word "merely."*

The court instructed that the jury should weigh the evidence by the same rules it would weigh it if the contest were between individuals, and should not give greater weight to the testimony for plaintiff "merely" because she is a girl and defendant is a corporation. Held,

that it was error for the court to use the word "merely" because it would imply that otherwise it was proper to give greater weight to the testimony of plaintiff's witnesses than to those of defendant, the error was harmless. *Jones v. Springfield Traction Co.*, 137 Mo. App. 408, 118 S. W. 675.

(s) *Instruction referring to "the" instead of "a" contract.*

In an action against a decedent's estate on a contract for services, the court charged that the action was based on "the" contract, express or implied, between plaintiff and decedent, and that, under the law, it would be improper to allow plaintiff to testify in her own behalf, the jury being instructed that they should not allow plaintiff's inability to testify to militate against her in arriving at the verdict. Held that, if the instruction was objectionable as referring to "the" contract instead of "a" contract, the objection was not sufficiently misleading to be prejudicial. *Grubbs v. Ray* (Mo.), 141 S. W. 17.

(t) *Instruction improperly employing the word "stumble," in an instruction.*

In an action against a city caused by a defective sidewalk, the use by the court of the word "stumble," when no such word was used in the petition, was not reversible error. *Swanson v. City of Sedalia*, 89 Mo. App. 121.

(u) *Instruction with broader meaning than intended.*

Instruction having a broader meaning than was intended is harmless, if it did not, in fact, mislead the jury. *Burrell's Est.*, 77 Cal. 482, 483, 19 P. 880.

(v) *Incorrect sentence in otherwise reasonably correct instructions.*

An incorrect sentence, in an otherwise reasonably cor-

rect instruction on the measure of damages, held not to require a reversal, where the jury could not have been misled thereby. *Molesky v. South Bend Coal & Mining Co.* (Pa. Sup.), 93 A. 485; *McBride v. Wallace* (N. D. Sup.), 117 N. W. 857.

(w) *Court advising jury of "proof" of unlawful means, where word was used for evidence.*

No injustice was done in an action under the Sherman Antitrust Act, July 2, 1890, against trust of lumber organizations to recover damages to the interstate trade of manufacturers by a combination compelling them to minimize their factory through the use of a boycott, because the court spoke to the jury of "proof" of unlawful means, where the context shows that the word was used in the popular way for evidence. *Lawlor v. Loewe* (Conn.), 235 U. S. 522, 35 Sup. Ct. 170, 59 L. ed. 341.

(x) *Trial judge inadvertently using one word for another.*

An inadvertent mistake by the trial judge in using one word for another is not ground for reversal, where the mistake does not clearly affect the jury, and counsel did not call the judge's attention to the matter at the time. *Cooper v. Altoona Concrete Construction Co.*, 53 Pa. Super. Ct. 141.

(y) *Where injury was fixed by petition as on or about May 16, and evidence so showed, charge placing date as on or about May 15.*

Where an injury sued for was fixed by the petition as on or about the 16th day of May, and the evidence showed that it occurred on that date, it was not prejudicial error in the general charge to place the date of the injury on or about the 15th day of May. *Settle v. Traction Co.* (Tex. Civ. App.), 126 S. W. 15.

(s) *Instruction erroneously using "influnced" for "uninfluenced."*

The word objected to in the instruction was "influenced." An examination of the context of the instruction indicated that, by a clerical error, the prefix "un" had been omitted, and that the word intended was "uninfluenced." Held, that the mistake was so obvious that it could not have misled the jury, and was not cause for reversal. *Anderson v. Anderson*, 128 Ind. 254, 27 N. E. 724.

(a-1) *Instruction, in a will contest, using the word "executor," instead of "testator."*

In the attesting clause of a will, and also in an instruction in the contest of a will, on the ground that the testator was unsound, the use of the word "executor" instead of "testator" was a simple clerical error, and would mislead no one. *Barricklow v. Stewart*, 163 Ind. 438, 72 N. E. 128.

(b-1) *Inadvertent but harmless expression in an instruction.*

Unless an inadvertent expression in an instruction is shown to have probably influenced the jury to appellant's injury, it will be treated as harmless error. *R. Co. v. Reed* (Ind. App.), 88 N. E. 1080.

(c-1) *Inadvertently referring in the charge to a supposed statute.*

In an action to determine the rights of parties as regards the height to which defendant may back the water in a creek by means of his dam, an instruction which inadvertently refers to a statute as giving title to the easement, but intends the rule of law giving title by adverse user, there being no statute on the subject, is harmless error. *McGeorge v. Hoffman*, 33 Pa. St. 381, 19 A. 413.

- (d-1) *In action to recover for construction of theater, instruction using the words, "extravagant and unnecessary."*

In a suit to recover for the construction of a modern \$30,000 theater building, while there was no evidence to support the use of the words, "extravagant and unnecessary," in the court's instruction that such expense should not be included in the cost of the building, yet, in view of charges for printing tickets, court costs, hack fare, etc., and, as the court evidently had this in mind in its instruction, the plaintiff was not prejudiced thereby, for he could not recover for such charges under his contract. *Neher v. Viviani* (N. M. Sup.), 110 P. 695.

Sec. 208. Omissions and failures.

- (a) *Omission of petition to allege demand of payment and tender of checks.*

In an action by the drawer of checks to recover from the drawee the amount thereof, they having been paid on a forged indorsement, omission of the petition to allege demand for payment and tender of the checks was not reversible error, where the evidence showed that plaintiff's attorney called on the drawee to secure repayment and was ready and willing to turn the checks over, and that a formal demand would have been useless. *Lieber v. Bank*, 137 Mo. App. 158, 117 S. W. 672.

- (b) *Insolvency of omitted party defendant cured error in his dismissal.*

In an action on a bond against a partnership, the individual members thereof and the surety on the bond, a dismissal as to one partner, not served, was not prejudicial, where the evidence showed that he was notoriously insolvent and a non-resident. *Geo. Scalfi & Co. v. State*, 96 Tex. 559, 73 S. W. 441.

(c) *Omission to serve copy of cross-complaint on plaintiff.*

Civil Code Procedure, sec. 442, provides that the defendant's cross-complaint asking affirmative relief relating to the transaction sued on must be served on the parties affected thereby. Held, that where none of the rights of one of the parties was prejudiced by defendant's omission to serve a copy of the cross-complaint on him, such failure was not ground for reversal. *Mackenzie v. Hodgkin*, 126 Cal. 591, 59 P. 36, 77 Am. St. Rep. 209; *Hodgkin v. Williams*, Id.

(d) *Demurrer erroneously overruled, but omission supplied by other evidence.*

When a demurrer to plaintiff's evidence was overruled, when, owing to the omission of some testimony, it should have been sustained, but afterwards defendant introduced evidence which supplied the omission, and, upon all the evidence introduced at the trial, the judgment was properly given to the plaintiff, the error became immaterial. *Goddard v. Donaħa*, 42 Kan. 754, 22 P. 708; *Stephens v. Scott*, 43 Kan. 285, 23 P. 555.

(e) *Error in overruling demurrer to complaint harmless, where omission is subsequently supplied by answer or replication.*

An error in overruling a demurrer to a complaint is harmless, where the defect or omission in the complaint was subsequently supplied by the answer or allegations in the replication. *Water Supply & Storage Co. v. Larimer & Weld Reservoir Co.*, 25 Col. 87, 53 P. 386.

(f) *Omission to formally strike out improper testimony.*

The omission of the court to formally strike out testimony which it had truly charged could not entail any liability upon defendant sued for negligence; held, to

afford no ground for reversal. *McCoy v. Munro*, 76 App. Div. 435, 112 St. Rep. 849, 78 N. Y. Supp. 849.

(g) *Argument based on omission of claim from inventory not ground for reversal.*

Since in assumpsit by an administrator, plaintiff's failure to produce a book on which the demands constituting their claims were charged, was a legitimate subject of comment in argument, they could not have been harmed by an argument based on these facts, that as administrators they had not included the claim sued on in their inventory, is not ground for reversal. *Blaisdell v. Davis*, 72 Vt. 295, 48 A. 14.

(h) *Technical omissions are objections too trifling to be noticed on error. De minimus non curat lex.*

The omission of the presiding judge to sign the record, or its want of form, or the omission to enter bills of particulars on the record, are objections too trifling to be noticed on error. *De minimus non curat lex. Harper v. Commissioners, Wright (Ohio Sup.)*, 708.

(i) *Omitting from an instruction, in determining the preponderance of evidence, the element of number of witnesses.*

Error in omitting from an instruction on the things to be considered in determining the preponderance of evidence, the element of number of witnesses, is harmless, where the question of numbers is unimportant. *R. Co. v. Lawlor*, 229 Ill. 621, 82 N. E. 407, affm'g judgm't, 132 Ill. App. 280.

(j) *Omission from charge of words "from the evidence" after "if you believe," unless it appears that jury were misled.*

An instruction which does not contain the words,

“from the evidence,” after the words, “if you believe,” is not so erroneous that the judgment will be reversed, unless it appears that the jury were misled thereby. *Holiday v. Burgess*, 34 Ill. 193.

(k) *Omission of “if” when clearly a clerical error not materially affecting the meaning of the instruction.*

The omission of the word “if,” when clearly a clerical error, not materially affecting the meaning of the instructions, is not ground for reversal. *Madrey v. Meyers*, 140 Ill. App. 218.

(l) *Omission of the word “ordinarily” from a charge defining ordinary care.*

The omission of the word “ordinarily” from the instruction defining “ordinary care,” as such care as a man of ordinary care and prudence would have (ordinarily) used, if inaccurate, as required by Statutes 1898, sec. 2829, may be regarded as immaterial error, it being apparent no injury resulted. *Palmer v. Schulz*, 138 Wis. 455, 120 N. W. 348.

(m) *Omission to charge as to contributory negligence.*

The fact that one of several instructions given in an action against a railroad company for injuries, left out of view the question of plaintiff's contributory negligence, does not authorize a reversal, that question being clearly presented by another instruction. *R. Co. v. Lyon*, 22 Ky. L. R. 544, 58 S. W. 434.

(n) *Omission to charge as to malice cured by jury finding same.*

The erroneous omission of the element of malice from an instruction with reference to exemplary damages, in an action for slander, is harmless, where the jury specially

find that defendant was actuated by malice. *Walker v. Wickens*, 49 Kan. 42, 30 P. 181.

(o) *Omission of court to respond to propositions of law submitted.*

In an action submitted upon agreed facts, the omission of the court below to respond to propositions of law submitted for special finding, works no prejudice to plaintiff as upon the facts, and consequently, under the stipulation, no other judgment than that rendered could be rendered. *Macomber v. Saxton*, 28 Mich. 516.

(p) *Omission of word "clear" in charge as to preponderance of evidence.*

It was not reversible error that one instruction required that the plaintiff must satisfy the jury by a "clear" preponderance of the evidence, where the word "clear" was omitted in the other instructions, and the instructions, as a whole, were calculated to impress the jury that only a preponderance of the evidence was necessary. *Zimmerman v. Whiteley*, 134 Mich. 39, 95 N. W. 989, 10 D. L. N. 383.

(q) *Omission to charge supplied by another covering the ground.*

An omission from an instruction on the subject of negligence of the requirement of due care on the part of the plaintiff, may be regarded as harmless where that requirement is prominently set forth in other instructions on both sides. *R. Co. v. Johnson*, 116 Ill. 206; *Kindell v. Young*, 141 Ill. 188; *R. Co. v. Matthews*, 48 Ill. App. 361.

(r) *Omission to charge where integral fact on which it was based did not exist.*

Where the integral fact on which the requested in-

struction was based was without foundation, its refusal was harmless. *Wilson v. Western Fruit Co.*, 11 Ind. App. 89, 38 N. E. 827; *City of Muncie v. Haey*, 164 Ind. 570, 74 N. E. 250.

(s) *Instruction by omission of word rendered meaningless.*

Where a charge is defective owing to a word having been evidently omitted in copying it, rendering it meaningless, the error is not ground for reversal, since it could not have prejudiced the jury. *City of Columbus v. Neise*, 63 Kan. 885, 65 P. 643.

(t) *Instruction omitting essential element as to liability.*

Where an instruction fixing the liability of a person omits an essential element to such liability, but the proof in the case clearly supplies such omission, the judgment will not be reversed because of such error in the instruction. *Clarke v. Boyle*, 51 Ill. 104.

(u) *Instruction omitting the word "unlawful" in defining assault and battery.*

In an instruction defining an assault and battery, the omission of the word "unlawful" is harmless error, if the evidence sustains the unlawful character of the assault. *De Freitas v. Nunes*, 156 Ill. App. 17.

(v) *Omission of the words "if any" from an instruction in action for slander.*

In an action for slander, the court instructed that, if the jury find defendant guilty, they are not confined, in assessing plaintiff's damages, to such damages as will probably compensate plaintiff "for any such injury as the evidence shows she has received," but they may, in addition thereto, assess such damages as in their sound judgment plaintiff ought to receive, not exceeding the amount

claimed in the declaration. Held that, as the instruction was concerning punitive damages, the omission of the words "if any," after the part quoted, is not error sufficient to reverse the case. *Barth v. Hanna*, 158 Ill. App. 20.

(w) *Omission of formal general verdict unobjected to.*

The fact that a jury in a will contest returned only answers to special interrogatories, did not render the decree fatally erroneous, where the answers to the special interrogatories contained the substance of a general verdict, and no objection was made to the absence of a formal general verdict. *Bird v. Bird*, 218 Ill. 158, 75 N. E. 760.

(x) *Failure of court to pass upon pleas presenting no bar to the action.*

Where the cause was tried upon a joined issue in the court below, and there was a verdict and judgment for plaintiffs, while there was a demurrer to one special plea and an objection to the admission of another not acted on by the court, it was held that the pleas presented no bar to the action; the failure of the court to pass upon them afforded no ground for reversal. *Peshine v. Shepperson*, 17 Grattan (Va.) 472, 94 Am. Dec. 468.

(y) *Failure to incorporate in the petition allegation of the absence of gates at crossing.*

Where it is clear from the uncontradicted testimony in an action against a railroad company based on a crossing accident, that the injury was caused by the gross negligence of the employees in the management of the engine and cars, and that testimony with reference to the absence of gates did not influence the jury, the verdict will not be set aside because of the failure of the plaintiff to allege in her petition the failure to maintain gates as

a ground of negligence. *R. Co. v. Shaw*, 56 Kan. 519, 43 P. 1129.

(s) *Failure of petition to allege plaintiff's decedent was a city employee.*

Where a city employee was killed while attempting to unload gas naphtha shipped to the city, any error in certain counts of the petition therefor against the shipper, in failing to allege that plaintiff's decedent was an employee of the city, was harmless, in view of the evidence proving that fact. *Standard Oil Co. v. Wakefield's Adm'r*, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792.

(a-1) *Failure to give place of residence and postoffice address in petition by non-resident plaintiff.*

The error in failing to enforce session laws 1905, p. 545, chap. 327, by requiring plaintiff who does not reside in the county where suit is instituted to state in the petition his or her place of residence and postoffice address, is harmless and immaterial, where the defendant is familiar with the facts not stated. *White v. White*, 76 Kan. 82, 90 P. 1087.

(b-1) *Failure to file a replication.*

Where, in an equity suit, there has been a full and fair hearing on the merits, and substantial justice has been done, the decree will not be reversed because no replication was filed. *Cunningham v. Hedrick*, 23 W. Va. 579.

(c-1) *Failure of the court to pass on demurrer before rendering decision.*

The failure of the court to pass on a demurrer before rendering its decision in the case, is not prejudicial error if, in fact, the demurrer had no merit. *Loftus v. Fischer*, 106 Cal. 616, 39 P. 1064.

(d-1) *In action for false arrest, failure in answer justifying to state the offense and the grounds of the arrest.*

In an action for false arrest and imprisonment, failure of an officer in his answer justifying to state particularly the offense with which plaintiff was charged and the grounds of the arrest, was not material error, where plaintiff was fully informed of the cause of his arrest, and was not deprived of any right by lack of such information. *Morrison v. Pence*, 82 Kan. 420, 108 P. 831.

(e-1) *Where there was in fact a default, failure to make an entry thereof.*

Where there was in fact a default, failure to make an entry thereof was harmless. *Huffstetker v. Insurance Co.* (Fla. Sup.), 65 S. 1.

(f-1) *Failure to put in judgment sustaining demurrer to plea requirement that defendant answer over to declaration.*

In an action on a policy of fire insurance for \$1,000 on a stock of merchandise, the policy containing the usual clause as to fraud or false swearing, the proof of loss showed a value of \$3,645.95. On the trial insured testified that the value of the goods as a stock for market was as stated in the proof of loss, but because of the discount allowed him when he bought them, the actual value was \$3,400, whereupon the defendant procured leave to file special pleas, to one of which the court properly sustained a demurrer, but omitted to put in the judgment sustaining the demurrer the requirement that the defendant answer over to the declaration. The plea sought to avoid recovery on the ground that there was fraud and false swearing, because the proof of loss showed the value to be only \$3,400. Held that, since it is plain that

no further answer on that line would have been vital, the loss being conceded total, the explanation of the witness reasonable, and after a full, fair inquest of the insurance, even though the swearing at one time or the other was designedly false, the omission was not cause for reversal. *Insurance Co. v. Lowenthal* (Miss.), 36 S. 1042.

(g-1) *Failure of court to pass on exceptions to report of commissioners.*

Where exceptions to the report of the commissioner would have been overruled had the court below considered them, the failure to pass on them was harmless error. *Bristol Iron & Steel Co. v. Thomas*, 93 Va. 396, 25 S. E. 110.

(h-1) *Failure of judge to make annual jury list according to law waived by acquiescence in irregular selection of jury.*

Under Code 1873, chap. 158, sec. 21, providing that "no irregularity in any writ of venire vitiates, or in drawing, summoning, returning or impaneling of jurors, shall be sufficient to set aside a verdict," unless the objector was injured and the objection made before the swearing of the jury; held, that the failure of the county judge to make the annual jury list according to law, but giving the clerk twenty-eight names of persons who were talesmen, and from whom a jury was sworn, without objection, was such an irregularity. *Town of Suffolk v. Parker*, 79 Va. 660, 52 Am. Rep. 640.

(i-1) *Failure of court to pass upon exceptions to deposition not employed in determining the case.*

The failure of the court to pass upon exceptions taken to the deposition of defendant is immaterial, where the deposition is not considered in determining the case, but

the injunction issued in the case is dissolved upon the bill and answer, there being no evidence to support the bill. *Motley v. Frank*, 87 Va. 432, 13 S. E. 26.

(j-1) *Defendant not prejudiced by court's failure to rule on objections to the evidence.*

Defendant held not prejudiced by the court's failure to rule on the objection to the evidence, where a subsequent motion to strike out such evidence and other evidence was overruled. *Doe v. Allen* (Cal. App.), 82 P. 568; *Coleman v. Drane*, 116 Mo. 387, 22 S. W. 801.

(k-1) *Failure to exclude improper answer which did no harm.*

The failure to strike out an improper answer of a witness is no ground of reversal where, from the uncontradicted evidence properly in the record it appears that no different conclusion would have been reached by the jury had the answer been excluded. *R. Co. v. Carr*, 170 Ill. 478.

(l-1) *Failure of the foreman of the jury to sign a special finding until after the jury were discharged.*

The fact that the foreman of the jury failed to sign a special finding until after the jury was discharged is not an error affecting any substantial right of the party complaining. *City of Cincinnati v. Johnson*, 28 O. C. C. R. 377, judgm't affm'd, 76 O. S. 567, 81 N. E. 1182.

(m-1) *Failure of the court to consider the constitutionality of an act attacked by the pleadings.*

The failure of the court to consider the question of the constitutionality of an act attacked by the pleadings, is not cause for reversal where the act is valid. *Sandford v. R. Co.*, 79 S. C. 519, 61 S. E. 74.

Interrogatories and Instructions to the Jury. § 208

(n-1) *Failure to submit to the jury the question whether the three lots of heddles had been accepted.*

Where defendant contracted to buy 1,000,000 heddles from plaintiff, a resident of Germany, and they were shipped in eight lots, and three lots were received and used by defendant, and the remaining five were rejected, the court charged that if the whole of the shipments were of the character required by the contract, plaintiff was entitled to recover the price of all of them, and that, if they were not, plaintiff could not recover for the last five lots, but could recover the price of the three lots received and used, less a deduction for defects, and defendant assigned as error, failure to submit to the jury the question whether the three lots had been accepted so as to bind defendant to pay for them. Held, not maintainable, where the jury found that all the heddles furnished were such as required by the contract. *Koch v. Bamford Bros. Silk Mfg. Co.*, 69 N. J. L. 252, 55 A. 271.

(o-1) *Failure of the court to number its instructions in consecutive paragraphs.*

The failure of the court to number its instructions in consecutive paragraphs as required by Comp. Laws, sec. 2059, will not justify a reversal of the judgment, it appearing that no rights of the parties were affected thereby. *Miller v. Preston*, 4 N. M. (Gild.) 396, 17 P. 565.

(p-1) *Failure to charge on the measure and elements of damage.*

Failure to charge on the measure and elements of damage, in a personal injury case, is not cause for reversal, when no charge of the kind was requested. *Storck v. Mesker*, 55 Mo. App. 26; *R. Co. v. Vinson* (Tex. Civ. App.), 24 S. W. 956.

(q-1) *Failure to charge upon reduced capacity of the plaintiff to labor.*

In an action for personal injuries, though it is the duty of the judge to charge that plaintiff's declining years, and the apparent decrease of his capacity to labor, should be considered in estimating damages, a judgment will not be reversed for the omission so to charge if, under the facts in the case, the jury could not rightfully have found a smaller verdict. *City of Griffin v. Johnson*, 84 Ga. 279, 10 S. E. 719.

(r-1) *Failure to submit the question of the execution of a chattel mortgage to the jury.*

Under the statute providing that, in a case submitted on special issues, failure to submit an issue to the jury, and its decision by the court, shall not constitute reversible error where there was evidence to support the finding, and no request was made for its submission; it is not reversible error in a chattel mortgage foreclosure proceeding to fail to submit to the jury the execution of the mortgage, no request having been made therefor, and the mortgage having been, in fact, duly proved. *Warren v. Osborne* (Tex. Civ. App.), 97 S. W. 851.

(s-1) *Failure to instruct the jury to make special findings, in case they returned a general verdict.*

Any error in failing to instruct the jury to make special findings only in case they returned a general verdict is harmless, they having returned a general verdict. *Wallace v. Skinner* (Wyo. Sup.), 88 P. 221.

(t-1) *Failure of the court properly to interpret the word "immediatcly" as used in a contract.*

Where a contract for the sale of certain machinery after trial, provided that, if rejected, the buyer should

immediately lay the same on cars for return to the seller, and the buyer, after rejecting the machinery, did not, within any time proven, load the machinery on cars for return, it was not prejudiced by the court's failure to properly interpret the word "immediately" as used in such contract. *Sturtevant Mill Co. v. Kingsland Brick Co.*, 74 N. J. L. 492, 70 A. 732.

(u-1) *Failure of an instruction to specify the time from which interest might be allowed.*

Failure of an instruction to specify the time from which interest might be allowed is not ground for reversal, it being reasonably certain no injury resulted. *Oliver & Burr v. Noel Const. Co. of Baltimore City*, 109 Md. 465, 71 A. 959.

(v-1) *Failure to instruct as to plaintiff's admission of payment by himself and his three sisters for certain services.*

In an action for money collected by defendant as attorney in which he counterclaimed for services rendered, error in not instructing as to the plaintiff's admission of the payment of a sum by himself and his three sisters for certain services was not prejudicial to defendant, where his own statement of the account between the parties, showed payment of such sum in full payment of such services. *Youngerman v. Pugh* (Iowa), 125 N. W. 321.

(w-1) *Failure to submit to jury whether the hernia complained of was an old injury.*

Any error in a personal injury action, in not submitting to the jury whether the hernia complained of was an old injury, which was greatly aggravated by the accident, and not caused by it, was harmless, where the jury found

that it was not an old injury. R. Co. v. Colson (Ind. App.), 99 N. E. 433.

(x-1) *Failure to instruct on issue on which there is no evidence.*

It is not prejudicial error to fail to call the attention of the jury by instructions to an issue in the case on which there is no evidence to support a verdict in behalf of the party complaining. Flanagan v. R. Co., 83 Iowa 639.

(y-1) *Failure to instruct as to fact the verdict shows did not exist.*

A party can not claim that he has been prejudiced by the failure to instruct, at his request, as to what his rights would have been under a condition of things which the verdict shows conclusively did not exist. Wilhelm v. Fimple, 31 Iowa 131.

(z-1) *Failure to give proper instruction, when any other verdict would have had to be set aside.*

The failure to give a proper instruction will not be reversible error if, even had the instruction been given, the result must have been the same, and any other verdict would properly have been set aside. R. Co. v. Rich, 33 Iowa, 113; Olson v. Neal, 63 Iowa, 214; W. B. Grimes Dry Goods Co. v. Malcolm, 58 Fed. 670 (Okl.) 7 C. C. A. 426, affm'd, 164 U. S. 483.

(a-2) *Charge failing to give qualifications upon a general rule of law.*

Where the instruction presents the mere general rule of law, and adds thereto one of several qualifications which, under certain contingencies, might modify the rule, the giving of the one qualification or the failure to

give them all, does not constitute error justifying reversal. *Gwinne v. Crawford*, 42 Iowa 63.

(b-2) *Failure to instruct to exclude services already paid for.*

It being clearly in evidence what payments had been made and what they covered, failure of the instruction as to the facts necessary to enable plaintiff to recover, to exclude the services which had already been paid for, could not have misled the jury. *Renfrew v. Goodfellow* (Mo. App.), 141 S. W. 1153.

(c-2) *Failure of instruction to limit recovery to the amount sued for.*

Failure of instruction to limit plaintiff's recovery to the amount sued for was without prejudice, where the verdict was less than the amount demanded. *Williamson v. R. Co.*, 133 Mo. App. 375, 113 S. W. 239.

(d-2) *Failure of jury to apportion damages between the plaintiffs.*

Failure of the jury, in an action for death by wrongful act, to apportion the amount of damages between the plaintiffs, when not prejudicial to defendant, is not ground for reversal. *R. Co. v. Woods* (Tex. Civ. App.), 64 S. W. 830.

(e-2) *Failure to find actual damages did not prevent awarding punitive.*

Where the jury finding for plaintiff found facts entitling to an award of actual damages, the failure to find actual damages did not prevent the finding of punitive damages, when authorized; for the error to assess actual damages was against plaintiff and in favor of defendant, of which he could not complain. *Adams v. R. Co.* (Mo. App.), 130 S. W. 48.

- (f-2) *Failure to qualify an instruction to the effect that plaintiff must have been working in the line of his duty at the time he was injured.*

In an action by a servant for injuries, the failure of the court to qualify an instruction by the statement that plaintiff must have been working in the line of his duty at the time he was injured, was not reversible error, where the uncontradicted evidence showed that he was acting within the scope of his employment when injured. *Hohenstein-Harmetz Furniture Co. v. Matthews* (Ind. App.), 92 N. E. 196.

- (g-2) *Failure of the court to mark instructions offered, "given" or "refused," will not work a reversal.*

A judgment will not be reversed because the court failed to mark on the margin of the instructions the word "given" or "refused," where the defeated party makes note on the margin of exceptions to the giving or refusing the instructions, as the case might be, although such exception was accompanied by a special exception to the failure of the court so to mark it. *Eickhoff v. Elkenbary*, 52 Neb. 332, 72 N. W. 308.

Sec. 209. Omissions from instructions.

- (a) *Omission from instruction of the words, "You will find for defendant."*

Omission at the end of an instruction of the words, "You will find for the defendant," is not ground for reversal, the court having told the jury that the defense was that insured, in his medical examination, specifically answered certain questions. *Wolf v. Sup. Lodge K. & L. of H.*, 160 Mo. 675, 61 S. W. 637.

- (b) *Incomplete instructions harmless where omission did no injury.*

Incompleteness in instructions is not ground of error where it appears that the evidence was such that the omission could have done no harm. *Joliet v. Fitzgerald*, 38 Ill. App. 483.

- (c) *Instruction as to ordinary care, omitting the closing words, "under the same or similar circumstances."*

Instruction that ordinary care of the driver would be "such a degree of care and caution, all things considered, that a reasonably prudent man would have exercised," without adding at the end the words, "under the same or similar circumstances," if error, was technical and not injurious. *Swalm v. R. Co.* (Wis. Sup.), 128 N. W. 62.

- (d) *Where pleadings and testimony stated a cause of action under two statutes, instructions as to one, omitting provision as to width traffic and use of highway.*

Where the pleadings and the testimony stated a cause of action under two statutes regulating the use of highways, and the verdict did not indicate under which statute recovery was allowed, error in an instruction as to one of the statutes in omitting the provision that regard should be had to width traffic and the use of the highway, does not necessitate a reversal. *Dunbar v. Jones*, 87 Conn. 253, 87 A. 787.

- (e) *Failure to instruct as to the effect of certain evidence.*

An instruction enumerating certain facts under the proviso, "if the jury believe" the same "from the evidence," but which failed to inform the jury what effect they should give thereto, was harmless. *White v. Sun Pub. Co.*, 164 Ind. 426, 73 N. E. 890.

(f) *Erroneous charge relating to an issue not submitted.*

An erroneous charge by the judge is harmless, where it related to an issue not submitted to the jury. *Castellaw v. Guilmartin*, 58 Ga. 305.

(g) *Failing to give proper and giving erroneous charge.*

Failure of the court to give an instruction asked, and the giving of an erroneous one in regard to defendant's duty under the statute can not be assigned as error, where defendant was not entitled to any direction or instruction under such statute. *Vaughn v. R. Co.*, 145 Mo. 57, 46 S. W. 952.

Sec. 210. Oral instructions, where written requested.

(a) *Oral instructions, where written requested.*

For a court to give instructions to the jury orally, after having been requested in due time and in the proper manner to reduce them to writing, is error for which the judgment will be reversed, unless it is affirmatively shown that no injury can have been done by it. *Gray v. Stivers*, 38 Ind. 197.

(b) *In the absence of evidence to support the issue it was harmless to ignore the request to charge in writing.*

Where there is no evidence to support the issue, the case will not be reversed because the judge orally instructed the jury to find for defendant, instead of giving instructions in writing as required by the statute. *French v. Wolf*, 22 Ill. App. 525; *Greathouse v. Summerfield*, 25 Ill. App. 296; *R. Co. v. Holt*, 1 White & W. (Civ. Cas. Ct. App. Texas) 835.

Sec. 211. Plaintiff barred from objecting to instruction offered by defendant identical with plaintiff's, or to complain of one which he suggested.

(a) *Plaintiff barred from objecting to instruction from defendant identical with his own.*

Plaintiff can not be heard to object to an instruction given at the instance of the defendant which is identical in purport with one given at his own instance. *Gracy v. R. Co.*, 53 Fla. 350.

(b) *A party can not complain of incorrect instruction which he suggested.*

A party asking the court to give an instruction to the jury can not complain because his request is complied with, even though such instruction incorrectly states an issue to be tried. *Dawson v. Williams*, 37 Neb. 1, 55 N. W. 284.

Sec. 212. Prima facie evidence.

(a) *Refusal of charge that certificate of labor commissioner be regarded as prima facie evidence that machinery was in safe condition.*

In an action by a servant for an injury received at an unprotected knob-saw, defendant, a mill operator, introduced in evidence a certificate of inspection of the deputy labor commissioner, and asked for an instruction that the certificate be regarded as prima facie evidence that the machinery was in a reasonably safe condition, which was refused. Held that, as the deputy commissioner testified, and other evidence was given to show that the saw was properly safeguarded, the failure to give the instruction asked was not prejudicial error. *Benner v. Wallace Lumber & Mfg. Co.*, 55 Wash. 679, 105 P. 145.

Sec. 213. Proximate cause.

- (a) *In an action for injury to employee in elevator pit, instruction submitting the question of proximate cause.*

In an action for injury to an employee while working in an elevator pit caused by concurrent negligence of a vice-principal in leaving an opening in the shaft, and of a fellow servant in permitting a truck to roll into the shaft, submission of the question of proximate cause was error harmless to defendant. *Blanchard v. Vermont Shade Roller Co.* (Vt. Sup.), 79 A. 911.

Sec. 214. Question of law to the jury.

- (a) *Submitting question of law to the jury which was properly answered.*

Where, in an action for injuries to a traveler on a vacant street, the court, under the evidence, should have stated to the jury that the street was a public street of the city, error in instructions submitting the question whether the street was a public street was not prejudicial to the city. *Peltier v. City of St. Louis* (Mo. Sup.), 141 S. W. 608; *Dyas v. Hanson*, 14 Mo. App. 363; *Cook v. Mann*, 6 Col. 21; *Consolidated Coal Co. v. Schaefer*, 135 Ill. 210; *American Circle v. Eggers*, 137 Ill. App. 595; *Gettys v. March*, 145 Ill. App. 291; *Akin v. Davis*, 11 Kan. 580; *Insurance Co. v. Curran*, 8 Kan. 9; *Davis v. Wilson*, 11 Kan. 74; *Bramel v. Bramel*, 101 Ky. 64, 18 Ky. L. R. 1074, 39 S. W. 520; *Colston v. Chenault*, 20 Ky. L. R. 226, 45 S. W. 664; *Insurance Co. v. Hazlehurst*, 30 Md. 380; *Castleberg v. Wheeler*, 68 Me. 266, 12 A. 3; *Staddan v. Hazzard*, 34 Mich. 76; *Allen v. Duffe*, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159; *Hooper v. Webb*, 27 Minn. 485, 8 N. W. 589; *Shields v. Norton* (N. Y.), 143 F. 802, 74 C. C. A. 254, affm'g 132 F. 873;

Stolz v. City of Syracuse, 111 N. Y. Supp. 467, 59 Misc. Rep. 600; Valentine v. Woods, 110 N. Y. Supp. 990, 59 Misc. Rep. 471; Clafin v. Lenheim, 66 N. Y. 301, rev. 5 Hun 269; Coe v. Cassidy, 72 N. Y. 144, affm'g 6 Daly 242; Johnson v. Shively, 9 Ore. 333; Austin v. Townes, 10 Texas 24; Brown v. Insurance Co., 83 Vt. 161, 74 A. 1061; Miller v. White, 46 W. Va. 67, 33 S. E. 332, 76 Am. St. Rep. 791; R. Co. v. Morris, 16 Wyo. 308, 93 P. 664.

- (b) *Failure to instruct as to legal effect of a paper cured by correct construction by the jury.*

The supreme court will not reverse for a failure of the judge to instruct the jury as to the legal effect of a paper submitted to it as evidence, if the finding evinces a correct construction by the jury. Roberts v. Alexander, 73 Tenn. (5 Lea) 412.

- (c) *Erroneous submission to the jury of question of the law of a foreign country.*

The erroneous submission to the jury of the question of the law of a foreign country, on a given subject, instead of instructing them what the law is, was without prejudice and not ground for reversal, where the jury decided the question correctly. Insurance Company v. M. S. Dollar S. S. Co. (Cali.), 177 F. 127, 100 C. C. A. 547.

- (d) *Error in submitting question of intention of borrowing member of building association, where verdict was right.*

In an action by a borrowing member against a building association to recover usury paid, it was error to submit to the jury the question of the intention of the parties, as the member is a borrower, and the associa-

tion could lend money regardless of the intention, but, as the error did not induce an erroneous verdict, it was harmless error. *Pioneer B. & L. Ass'n v. Jones*, 22 Ky. L. R. 41, 56 S. W. 657.

(e) *Where party did not object at the time to the submission of a question of law to the jury, he can not raise question in appellate court.*

Where a deed, purporting to have been executed under a power of a public and statutory nature, is sought to be used in evidence, the power should be shown, and where the power is the order of a court of special and limited jurisdiction, and the record of the order or decree is presented, the question whether the deed was void for want of jurisdiction in the court to make the order or decree, is a question of law for the court, and not for the jury. Where, however, the opposite party, upon the introduction of the deed, without the power, makes no objection, and introduces subsequently the record of the order of the court, fails to ask the court to pass upon the sufficiency of the deed, relies upon instructions of the court covering the subject matter given at his request, and leaves the entire question to the jury, he can not object to this action for the first time in an appellate court. The question here, upon such an appeal is, whether upon the evidence the finding of the jury was erroneous. *Emerson v. Ross's Adm'r*, 17 Fla. 122.

(f) *Instruction submitting abstract proposition to the jury.*

The only case in which an instruction submitting a question of law to the jury will not work a reversal is, where the question of law is an abstract proposition, not relevant to any evidence in the case; and hence, immaterial and harmless, or where the jury have manifestly decided the question correctly. *Speak v. Ely & Walker Dry Goods Co.*, 22 Mo. App. 122.

- (g) *Submission to jury of question whether butter contained an "abnormal" percentage of water.*

Whether or not a regulation of the Commissioner of Internal Revenue, made in pursuance of the Oleomargarine Act, May 9, 1902, chap. 784, sec. 4, 32 stat. 194 (U. S. Com. St. Supp. 1907, p. 837), has the force of law as a conclusive determination of the fact, and which furnished a working rule for the guidance of officers and the information of manufacturers. On the trial of an action by a manufacturer to recover taxes exacted on butter claimed to contain more than sixteen percent of water, the submission to the jury of the question, whether such a percentage of water was "abnormal," was an error of which the plaintiff could not complain. *Coopersville Co-operative Creamery Co. v. Lemon* (Mich.), 163 F. 145, 89 C. C. A. 595.

- (h) *Submission to the jury of the constitution and by-laws of a fraternal society.*

Where, in an action against a fraternal society, the constitution and by-laws thereof were admitted in evidence, error of the court in allowing the jury to construe the same was not prejudicial to defendant, as it gave the jury an opportunity to find against plaintiff on a question of fact that should not have been submitted to them. *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811.

- (i) *Submitting the construction of a written contract to the jury, where proper construction would have been adverse to complainant.*

Though the court should construe a written contract, still, if he submits it to the jury, the judgment will not be reversed therefor, where it appears that a proper construction of the contract would have been adverse to the

complaining party. *R. L. Moss Mfg. Co. v. Carolina Portland Cement Co.*, 1 Ga. App. 232, 57 S. E. 914; *Carolina P. C. Co. v. R. L. Moss Mfg. Co.*, Id.

- (j) *Submitting to the jury construction of a decree cured by their proper interpretation thereof.*

Error in submitting to the jury the construction of a decree is harmless, they having properly interpreted it. *Charles v. R. Co.*, 124 Mo. App. 293.

- (k) *Jury giving right interpretation to alleged slanderous words improperly submitted to them.*

The error of submitting to the jury a question as to the meaning of alleged slanderous words is harmless, where the jury find that the words were intended to convey the same meaning as their legal interpretation imports. *Krebs v. Oliver*, 78 Mass. (12 Gray) 239.

- (l) *Error in submitting question of law concerning the stringing of electric wires.*

Where an electric light company placed its wires in branches of trees, so that all the potential wires were within a short distance of low potential wires, and it was undisputed that proper construction required such wires to be placed at least five feet apart, and, even when so placed, should not be permitted to pass through the branches of trees; the company being guilty of negligence, as a matter of law, the error in submitting the question to the jury was without prejudice. *Grimm v. Omaha Electric Light & Power Co.* (Neb. Sup.), 112 N. W. 620, judgm't affm'd on rehearing, 114 N. W. 769.

- (m) *In action for injuries to servant from column of wire falling on him, submitting to jury question of foreman's authority and duty to brace the columns.*

In a servant's action for injuries by a column of wire

which he was stacking falling on him, after he had called the foreman's attention to its leaning condition, error in submitting the foreman's authority and duty to brace the columns, was not prejudicial. *Burkard v. A. Leachen & Sons Rope Co.*, 217 Mo. 466, 117 S. W. 35.

(n) *Erroneously submitting to jury whether child was non sui juris.*

Where, in an action by a parent for the death of a child, there was nothing to show that the child, at the time of the accident, did not exercise such prudence as was ordinarily possessed by one of his age, nor anything to show negligence, judged by the standard of care required of an adult, error in submitting to the jury the question, whether the child was non sui juris, though no such issue was raised by the pleadings, was not reversible. *Ind. Traction & Term. Co. v. Beckman*, 40 Ind. App. 100, 81 N. E. 82.

(p) *Jury correctly passing on question of res adjudicata.*

That the court allowed the jury to pass upon the question whether the matter in controversy was res adjudicata, instead of deciding the question from the record produced, if erroneous as submitting a question of law, is harmless, where the record was conclusive against complainant. (Md.) *Thompson v. Roberts*, 63 U. S. (24 How.) 233, 16 L. ed. 648.

(q) *Question of legitimacy submitted to the jury.*

A question submitted to the jury under General Statutes 1866, chap. 66, sec. 199, an appeal from the probate court was, whether plaintiff was the legitimate child of the deceased; she was born out of wedlock, and her mother, since deceased, after her birth intermarried with the deceased putative father. Held, as the only real question was, as to whether she was the child of the deceased,

the fact that the question actually submitted was broader than this and involved a question of law, could result in no actual prejudice to defendant, and was not ground for a new trial. *McArthur v. Cragie*, 22 Minn. 351.

(r) *Submitting to the jury the question whether a contract was modified by certain letters.*

Error in submitting the question, whether a contract was modified by certain letters was not prejudicial, where the jury correctly decided the question. *Hardy v. Ward*, 150 N. C. 383, 64 S. E. 171; *Mitchell v. Rushing* (Tex. Civ. App.), 118 S. W. 582.

(s) *Submitting correspondence to the jury, instead of advising them of its legal effect.*

Submitting to the jury correspondence, instead of advising them of its legal effect; held, not material error, where the jury's construction of the correspondence was the only one justified. *Brown v. Quinton*, 86 Kan. 658, 122 P. 116; *Wilmoth v. Hamilton* (Pa.), 127 F. 48, 61 C. C. A. 584.

(t) *Submitting to the jury for construction rules and regulations of a railroad company.*

Where the rules of a railroad company admitted of but one construction as to the fact that the train dispatcher had control of the movements of trains and engines, any error of the court leaving it to the jury to construe the rules and regulations was harmless. *Smith v. R. Co.*, 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729.

(u) *Submitting to a jury the time within which a check should be presented to a bank.*

One who accepts a check upon a bank in settlement of an indebtedness is bound, in order to hold the drawer of the check, to present it to the bank for payment within

a reasonable time, and what is a reasonable time depends upon the circumstances of the case and is a question of law for the court; though, if submitted to the jury, it will not be reversible error if they decide correctly. *Selby v. McCullough*, 26 Mo. App. 66; *Wear v. Lee*, 26 Mo. App. 99.

(v) *Error in submitting question of carrier's negligence in using water in extinguishing fire.*

Where, in an action against a carrier for damages to matches transported, due to the rough handling of the car causing the matches to ignite, and due to the use of water in excessive quantities in quenching the flames, the jury did not award damages due to the use of water, an error in submitting the question of the carrier's negligence in the use of water in putting out the fire was harmless. *Modern Match Co. v. R. Co.*, 140 Mich. 570, 104 N. W. 19, 12 D. L. N. 269.

(w) *Correct construction of written instrument cured error in its submission to the jury.*

Where the construction of a written instrument is erroneously submitted to the jury, the error is without prejudice, if it appears that they gave it a correct construction. *Pence v. Langdon* (Minn.), 99 U. S. 578, 25 L. ed. 420; *Cutton v. Pearsol*, 146 Cal. 690, 81 P. 25; *Brown v. Heash*, 24 Conn. 73; *R. Co. v. Riley*, 8 Ky. L. R. (abst.) 267; *Wood v. Whips*, 16 Ky. L. R. 403, 28 S. W. 151; *Henson v. Campbell*; 20 Md. 223; *Baker & Co. v. Huntington* (Ore. Sup.), 87 P. 1036, judg. mod. on rehearing, 89 P. 144; *Danforth v. Evans*, 16 Vt. 538; *Castleton v. Langdon*, 19 Vt. 210; *Martineau v. Steele*, 14 Wis. 272.

Sec. 215. Recalling jury and giving further charges.

(a) *Recalling jury and giving further charges.*

Error in recalling the jury and giving a further in-

struction respecting the value of the animals, for the alleged killing of which by an engine of defendant company the plaintiff's action in damages was brought, is harmless where the verdict for plaintiff was for a much smaller amount than might have been awarded under the testimony, in the light of the original instructions. *R. Co. v. Vance*, 9 Kan. App. 565, 58 P. 233.

Sec. 216. Redundant instructions.

(a) *Redundant instruction that was harmless.*

A redundant instruction is not reversible, if in fact harmless. *Raether v. Town of Mentor*, 142 Wis. 238, 126 N. W. 468.

(b) *Instructions long, and to some extent repeated, were not prejudicial.*

That instructions are long and, to some extent, repeated, and hence, to that extent unnecessary, will not affect a verdict or judgment otherwise without prejudicial error. *Evans v. R. Co. (Utah Sup.)*, 108 P. 638.

Sec. 217. Refusing instruction when substantially the same was given.

(a) *Refusing instruction when substantially the same was given.*

A judgment will not be reversed for refusal to give an instruction asked, if substantially the same instruction was given. *Viser v. Bertrand*. 16 Ark. 296.

(b) *Refused charge embodied in another given.*

Where, in an action on a note by an indorsee against an indorser, the only issue was, whether the indorser who indorsed the note for the accommodation of the maker or for the accommodation of the indorsee, the refusal to give an instruction embodying the nature of the in-

dorser's contract was not prejudicial to the indorsee, when, in another instruction, the court charged the jury authorizing a verdict for plaintiff if defendant was an indorser for value. *Larimore v. Legg*, 23 Mo. App. 645.

Sec. 218. Refusal to charge or to give instructions requested.

(a) *Refusal to give correct charge where jury specially found the fact upon which it was founded did not exist.*

The refusal to give a correct charge as to a matter properly before the jury will be error without prejudice, if the jury specially find that the facts on which the instruction was founded did not exist. *Martin v. Algona*, 40 Iowa 390; *Bank v. Graves*, 48 Iowa 228; *Trentman v. Wiley*, 85 Ind. 33; *R. Co. v. Brown*, 32 Ind. App. 130, 69 N. E. 407.

(b) *Refusal to give correct instructions unaffecting verdict.*

A judgment will not be reversed because of the refusal to give correct instructions, where it appears by answers to interrogatories that the result would have been the same had the instructions been given. *Kuhns v. Gates*, 92 Ind. 66; *R. Co. v. Hastings*, 136 Ill. 251; *R. Co. v. Ryan*, 70 Ill. App. 45; *Kershner v. Kershner*, 36 Md. 309; *R. Co. v. Weaver*, 34 Md. 431; *Vaughn v. Springfield Traction Co.*, 139 Mo. App. 91, 120 S. W. 683; *Brownlee v. Hewitt*, 1 Mo. App. 360; *Burdick v. R. Co.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528; *Smith v. Irvin*, 51 N. J. L. 507, 18 A. 852.

(c) *Refusal or failure to charge which produced no injury.*

Although an instruction has been erroneously refused, if its rejection has produced no injury to the party asking it, the judgment will not be reversed therefor. *Mussel-*

man v. Pratt, 44 Ind. 126; Insurance Co. v. Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; R. Co. v. Jurey. 111 U. S. 584; Insurance Co. v. Leonard, 120 F. 808, 57 C. C. A. 176 (Ill.), writ of error den. 187 U. S. 645, 35 Ga. 241; R. Co. v. Little, 19 Kan. 267; R. Co. v. Pavey, 48 Kan. 452, 29 P. 593; Thomas v. Tanner, 22 Ky. (6 T. B. Mon.) 52; North v. R. Co., 9 Ky. L. R. 480, 5 S. W. 467; Bank v. Bank, 1 Douglass (Mich.), 457; Miliken v. City of St. Clair, 136 Mich. 250, 19 N. W. 7, 10 D. L. N. 1030; Wheeling Bridge Co. v. Wheeling & B. Bridge Co., 34 W. Va. 155, 11 S. E. 1009, affm'd, 138 U. S. 287; Patterson v. McClanahan, 13 Mo. 305; Cheek v. Waldron, 39 Mo. App. 21; Maston v. Fanning, 9 Mo. 305; Smith v. Lee, 10 Nev. 208; Evans v. Printing Co., 4 Tex. Civ. App. 326; Lynds v. Town of Plymouth, 73 Vt. 216, 50 A. 1083.

(d) *Where fact was proved, refusal to give instruction thereon was harmless.*

The refusal of the court to give an instruction that a recovery can be had only upon proof of a particular fact, is not assignable for error when that fact was proved. Heart, v. Rhodes, 66 Ill. 351; Simmons v. Nelson, 48 Ill. App. 520.

(e) *Refusal of proper instructions, when substantial justice has been done between the parties.*

The refusal of proper instructions will not reverse, where it appears that substantial justice has been done. Hanchett v. Haas, 125 Ill. App. 111.

(f) *Substance of refused specials covered by general charge.*

The refusal of special requests for instructions to the jury, is not error where the substance of them, so far as necessary to be given to the jury, is covered by the gen-

eral charge. Davidson v. R. Co., 34 Minn. 51, 24 N. W. 324; Miller v. Sharp, 65 Mich. 21, 31 N. W. 608.

(g) *Refusal to charge the converse of those given.*

Plaintiff's petition alleged that defendant's car negligently ran into the rear end of his wagon, and the instruction to the jury made his rights to a recovery depend on the showing that the collision occurred in that manner, and that it was due to defendant's negligence as charged. Held, that the refusal of an instruction for defendant was harmless, as it only stated the converse of the proposition in the given instructions. Schafstette v. R. Co., 175 Mo. 142, 74 S. W. 826.

(h) *Refusal to instruct that decedent was required to exercise such care for his safety as one "of ordinary intelligence of the same age and experience."*

Refusal to instruct that decedent was required to exercise such care for his own safety as one "of ordinary intelligence of the same age and experience" would have ordinarily exercised; held not prejudicial. Stone's Adm'r v. R. Co., 157 Ky. 121, 162 S. W. 778.

(i) *Refusal of instruction that jury should consider every phase of plaintiff's injuries, including loss of time, etc.*

Where there was no evidence of plaintiff's health except as to his physical condition arising from the injury, and the damages were restricted to his injuries, defendant was not prejudiced by refusal of an instruction that the jury should consider every particular phase of the plaintiff's injuries, including the loss of time, if any, with reference to his condition and ability to earn money in his business or calling, to limit the same to loss arising from the injury. R. Co. v. Lynn (Ind. Sup.), 95 N. E. 577.

- (j) *In action for failure to notify plaintiff of sick-call, refusal to charge that jury could not, in determining whether defendant exercised due care, consider any failure to notify him on October 16.*

Where, in an action against a telephone company for failure to notify plaintiff of a sick-call, the charge authorized a recovery only in the event that the call was received by defendant on October 15, when it was sent, and that defendant failed to notify plaintiff thereof, "on that day," the refusal of a charge that the jury could not, in determining whether defendant exercised ordinary care to notify plaintiff of the call, consider any failure to notify him on October 16, if error, was not prejudicial, though there was evidence tending to lead the jury to believe that defendant could and should have notified plaintiff of the call on October 16. *Southwestern Tel. & Telephone Co. v. Owens* (Tex. Civ. App.), 116 S. W. 89.

- (l) *In an action for damages by overflow, refusal of instruction that plaintiff could not recover both for value of crops destroyed and for rent.*

Error, if any, in an action for the destruction of a road-bed over a stream, in refusing an instruction that plaintiff could not recover both for the value of the crops destroyed and for rent, was not prejudicial, where it appears that there was evidence tending to show that the rental value was much greater than the amount found by the jury. *R. Co. v. Saunders*, 85 Ark. 111, 107 S. W. 194.

- (m) *Refusal of instruction regarding the exercise of one's senses.*

The jury found specially that plaintiff's work required his close attention, and that his mind was so engrossed with his work that he did not hear or see the danger until too late. Held, that the defendant was not preju-

diced by the refusal of an instruction that no neglect of duty on the part of another excuses one from using his senses of sight and hearing where they are available, and if injured, where the use of either would have given warning, conclusively proves negligence. *Rink v. Lowry*, 38 Ind. App. 132, 77 N. E. 967.

(n) *Harmless refusal to instruct about turning off the gas.*

Refusal to instruct, in an action for negligence, because gas was turned off at the house valve instead of the street valve, that the averment of the complaint that the agent of the defendant gas company announced to plaintiff that he would turn off the gas at the street valve must be proved, is harmless, the jury having found that plaintiff knew that the agent had turned on the gas at the street valve, and that, after the escape of the gas was discovered, the agent informed plaintiff it would have to be turned off, and then went and turned it off, plaintiff not knowing that he turned it off at the house valve instead of the street valve. *Huntington Light & Fuel Co. v. Beaver*, 37 Ind. App. 4, 73 N. E. 1002.

(o) *Refusing instruction on the theory of trust, where the jury found agency.*

Where plaintiff's evidence tended to show that defendant had received money from plaintiff's intestate as agent, and defendant's evidence tended to show that he received it on an express trust, and the jury specially found the facts as alleged by plaintiff, the refusal of defendant's instruction, based on the theory of a trust, was harmless error. *Price v. Boyce*, 10 Ind. App. 145, 36 N. E. 766.

(p) *Refusal to instruct not to consider offers to prove was cured by warning and by verdict supported by the evidence.*

Error in permitting plaintiff, after defendant's objection

to a question had been sustained, to make an offer, in the hearing of the jury, over defendant's objection, to prove the facts detailed in the question, and refusal to instruct the jury not to consider the facts mentioned in the offer was harmless, where the jury were informed that they were not to consider any facts stated in the offers, and the jury's verdict was supported by the evidence. *Pape v. Hartwig*, 23 Ind. App. 333, 55 N. E. 271.

(q) *Erroneous refusal to charge as to unsafe condition of defective gutter.*

In an action for injuries to a pedestrian, resulting from a defective gutter crossing, the omission of the court to charge that it was necessary for plaintiff to prove that the crossing had remained in an unsafe condition for a sufficient length of time to have enabled defendant to repair the same was harmless, where the uncontradicted evidence clearly showed that sufficient time for such purpose had intervened after the crossing became unsafe and before the injury occurred. *City of Aurora v. Bitner*, 100 Ind. 396.

(r) *Refusal of defendant's requested instruction that it was only required to furnish reasonably safe appliances.*

Though the petition alleged insufficiency of the brakes of a car, and there was evidence that the brakes were out of order, and that had they been in proper condition the car would have been stopped by the brakeman in time to prevent the accident, yet the court, not having submitted as an issue of negligence the failure to equip the car with safe appliances, defendant may not complain of the refusal of its requested instruction that it was only required to furnish reasonably safe appliances. *R. Co. v. Jackson* (Tex. Civ. App.), 127 S. W. 872.

- (s) *In action to recover for two mules killed, instruction to find for defendant if but one killed was properly refused.*

In an action to recover damages for the killing of two mules, requested instructions to find for the defendant if one of the mules was killed, under circumstances stated in the charges severally, were properly refused. *Maultsby v. Boulware*, 47 Fla. 194.

- (t) *Not error to refuse charge not based upon any facts in the case.*

It is not error to refuse a charge, however correct as a legal proposition, based upon a state of facts not shown by the evidence to exist. *Mayer Bros. v. Wilkins*, 37 Fla. 244; *Kiech v. Enriquez*, 28 Fla. 597.

- (u) *Refusal to charge that, in determining the preponderance of the evidence, the jury must consider the opportunities of the witnesses for forming acquaintance with the facts, their demeanor, etc.*

A refusal to charge that, in determining the preponderance of the evidence the jury must consider the opportunities of the witnesses for forming acquaintance with the facts, their demeanor, their interest in the result and probability of their statements, is not reversible error. It is a correct statement, but its importance does not impress the court. *R. Co. v. Yount*, 7 Col. App. 189, 42 P. 1023.

- (v) *Although instructions asked by defendant and refused were sound in law, their refusal worked no injury.*

The instructions asked by the defendant below were sound in law, but their refusal worked him no injury, as when the jury found the disputed fact in favor of the plaintiff, the principle involved in the instructions asked

cut off the right asserted by the defendant. *Argentine Mining Co. v. Terrible Mining Co. (Colo.)*, 122 U. S. 478, 7 S. Ct. 1356, 30 L. ed. 1140.

(w) *In action for injury to mule, refusal to charge that jury should disregard any evidence that defendant did not have a man at the brake, etc.*

In an action against a city for injury to plaintiff's mule hired by defendant for work on the street, claimed to have been caused by being run over by a car to which it was hitched, because of the negligence of the city's agent in driving the mule over soft ground, causing it to fall, and in not having a man at the brake so as to stop the car in time to prevent striking the mule, but in which there was evidence that the mule was injured by catching its foot under a cross-tie and falling on the rail, and not by the car running against it, the court authorized a finding for plaintiff only if defendant's failure to have a man at the brake caused the injury to the mule. Held, that since the jury could not have found for plaintiff unless they found that the car ran upon the mule, any error in refusing to charge that the jury should disregard any evidence that plaintiff did not have a man at the brake, if they found the car did not run upon the mule or injure it, but that the injury was wholly caused by the mule catching its foot under the tie and falling across the rail, if error, was not prejudicial to defendant so as to be reversible. (*Tex. Civ. App.*) *City of Houston v. Dupree*, 129 S. W. 173, certified question answered (*Tex. Sup.*), 126 S. W. 1115.

(x) *Refusal to instruct that the personal interest of a party exercising his statutory privilege to testify for himself should be considered as affecting his credibility.*

A judgment on a verdict will not be reversed because of the refusal to instruct the jury that the personal in-

terest of a party exercising his statutory privilege to testify in his own behalf, should be considered as affecting his credibility. *Standard Oil Co. v. Brown* (D. C.), 218 U. S. 78, 30 S. Ct. 669, affm'g judgm't, 31 App. D. C. 371; *Champlin v. R. Co.*, 140 Ill. App. 94.

- (y) *Refusal to charge that if contract relied on was made between her and H., before he was connected with defendant, which it did not assume, defendant should recover.*

In an action against a corporation on a contract alleged to have been made with one H, defendant's manager, where H testified that there was no contract, either by himself individually, before his connection with defendant, or after his connection therewith, and another witness testified that the only contract entered into was after H had become manager of the defendant, and the court charged, that before plaintiff could recover she must prove that she contracted, as alleged, with defendant through the agent H, and that, if no such agreement was made between those parties, defendant should recover, error, if any, in refusing to charge that if the contract plaintiff relied on was made between her and H, before he was connected with defendant, and that defendant did not assume H's contract with plaintiff, defendant should recover, was not prejudicial. *Forrester-Duncan Land Co. v. Evatt* (Ark Sup.), 119 S. W. 282.

- (z) *Refusal of instruction that if the contract was made on Sunday it was invalid.*

In replevin of fish, where plaintiff's right depended entirely upon a bill of sale given it by an alleged partner of defendant's agent, the existence of the contract of purchase between plaintiff and defendant's agent was immaterial; and hence, the refusal of an instruction that if such contract was made on Sunday, it was invalid, was

harmless, if erroneous. *Payne v. Dexter* (Mass. Sup.), 97 N. E. 77.

(a-1) *Refusal to charge that if miner knew of dangerous condition of the roof, and failed to notify the mine boss, but continued to work, etc.*

Where, in an action for injury to a coal miner, by the caving in of the roof of his working place, the court charged that, if he knew of the dangerous condition of the roof, but continued to work, he was guilty of contributory negligence precluding a recovery, though the operator failed to furnish timbers for the support of the roof, the refusal to charge that if the miner knew of the dangerous condition of the roof and failed to notify the mine boss, but continued to work and was injured because of the dangerous condition of the roof, he could not recover, was not ground for reversal, as under both instructions, the continuance to work after knowledge of the defective condition precluded a recovery. *Miami Coal Co. v. Kane* (Ind. App.), 90 N. E. 13.

(b-1) *Refusal to instruct that if insured died of a chronic disease plaintiff could not recover.*

Where a life insurance policy provided that there should be no liability in case insured died of any chronic disease, and in an action on the policy there was no evidence that deceased was affected by any other chronic malady than heart disease, although his last illness began in a form of influenza or bronchitis, and the court instructed that if there was a disease of the heart at the time the insured became a policyholder, there could be no recovery, a refusal to instruct that if insured died of a chronic disease, plaintiff was not entitled to recover, was non-prejudicial. *Grant v. Insurance Co.*, 88 Minn. 397, 93 N. W. 312.

(c-1) *Refusal to give an incomplete and indefinite instruction.*

Where a request for an instruction was incomplete and indefinite, and if given it would have misled the jury, the refusal to give it is not ground for reversal, though the trial judge gave a different reason for his refusal. *Kelly v. Palmer* (Minn. Sup.), 97 N. W. 578.

(d-1) *Justifiable refusal to give instructions asked.*

A refusal to give instructions, if justifiable, is not ground for reversal of the judgment entered on the verdict, though such refusal might have misled the jury had they known what the instructions were, it not appearing that they had such knowledge. *Dike v. Pool*, 15 Minn. 315 (Gil. 168).

(e-1) *Refusal to charge that certain improper testimony was immaterial.*

Where evidence that defendants, after plaintiff was injured in their mill, refused to go with plaintiff to a surgeon after the accident, is introduced without objection, the refusal to instruct the jury that this fact is immaterial is harmless error, where the damages are not excessive, and the verdicts are the same upon two trials of the case. *Kinney v. Folkerts*. 84 Mich. 616, 48 N. W. 283.

(f-1) *Refusal to give specific instructions presenting defendant's theory of the case.*

Where, in an action for assault, the issue was not involved, and the court charged that, if the facts were as testified to by defendant and his witnesses, there could be no recovery, defendant was not prejudiced by the court's refusal to give specific instructions presenting defendant's theory. *Lee v. Longwell*, 136 Mich. 458, 99 N. W. 379, 11 D. L. N. 58.

(g-1) *Refusal to give all, when instructions given suffice.*

A judgment will not be reversed for a refusal to give all of the instructions requested by appellant, if those given fully presented his theory of the case and covered the entire controversy. *Harris v. Stewart*, 112 Mich. 82, 70 N. W. 1132, 3 D. L. N. 871.

(h-1) *Refusal to charge that in an action for criminal conversation collusion could not be inferred.*

Where, in an action for criminal conversation, the instructions made the case turn on the question, whether defendant was guilty of the alleged act of intercourse with plaintiff's wife, and defendant disclaimed any theory of conspiracy between plaintiff and his wife, and the jury found for plaintiff, the refusal to charge that collusion could not be inferred from certain facts was not prejudicial to plaintiff. *Smith v. Hockenberry*, 146 Mich. 7, 109 N. W. 23, 117 Am. St. Rep. 615, 13 D. L. N. 584.

(i-1) *Refusal to charge that advice of counsel would be no defense to criminal prosecution to collect a debt.*

Where, in an action for malicious prosecution, the jury, in answer to a special question, found that the criminal prosecution was not commenced for the purpose of collecting a debt due to defendant, the error in refusing to charge that the advice of counsel would be no defense to a criminal prosecution commenced by defendant to collect a debt due him was harmless. *Galla-way v. Burr*, 32 Mich. 332.

(j-1) *Refusal to charge, where the jury would not have been aided thereby.*

In an action in the nature of a suit in equity, the court, in its instructions, submitted two questions of fact for the jury to answer, and subsequently, upon the finding

of the jury, and of the evidence in the case, rendered judgment for defendant. Held, that plaintiff was not prejudiced by the refusal of the court to instruct the jury upon matters of law applicable to the whole case, but which would not have aided the jury in deciding the particular questions of fact submitted. *Stickel v. Bender*, 37 Kan. 457, 15 P. 580.

(k-1) *In action for personal injuries, refusal to charge that the jury specially find the amounts allowed for loss of time.*

In a suit for personal injuries, it was shown that plaintiff was a nurse, but not what wages she earned. The court charged, while she could recover for loss of time from the performance of her usual and ordinary labors and duties; held, that it was not prejudicial error to refuse to require the jury to find specially the amounts allowed for loss of time. *Kansas City v. Bradbury*, 45 Kan. 381, 25 P. 889, 23 Am. St. Rep. 731.

(l-1) *Refusal to charge based on hypotheses contrary to jury's findings.*

Requests to charge and refusals thereof need not be noticed by the appellate court, where they are based on hypotheses contrary to the jury's findings. *Anderson v. Thunder Bay River Boom Co.*, 57 Mich. 216, 23 N. W. 776.

(m-1) *Refusal to charge that if jury believed any witness swore falsely they might disregard all his testimony.*

A refusal of the court to instruct that if the jury believed that any witness had sworn falsely, they might disregard all of his testimony, was not reversible error, although such an instruction would have been justified under the evidence. *Paddock v. Somes*, 51 Mo. App. 320.

(n-1) *Refusal of proper instruction, where jury necessarily must have found as they did.*

On the trial of an issue involving the validity of the deed under which defendants claimed, it was contended that the deed was forged, but the uncontradicted evidence showed that the grantor, through his own negligence, allowed the grantee to mislead him into the execution of a deed different from what he intended. The court refused to submit the question, as requested by plaintiffs, whether defendants were bona fide purchasers, without notice of the fraud; but the evidence showed, without dispute, that such was the fact. Held, that a verdict for defendants should not be set aside for the error in refusing the instruction as, on the uncontradicted evidence, the jury, if properly instructed, must necessarily have found the same verdict. *Link v. Page*, 72 Tex. 502, 10 S. W. 699.

(o-1) *Refusal to charge was immaterial where judgment sustained the propositions therein.*

Where the uncontradicted evidence confirmed all the hypotheses of the requested instruction, it is immaterial whether the court gave or refused it, where the judgment rendered had the necessary effect, in the state of the evidence, of affirming the legal propositions therein contained. *Landauer v. Meyberg*, 27 Mo. App. 181.

(p-1) *Plaintiff's claim being uncontradicted, refusal to require jury to find specially the amount allowed for medical attendance.*

When, in a suit for personal injuries, there is nothing to contradict the testimony of the plaintiff as to the amount paid for medical attendance, it is not prejudicial error to refuse to require the jury to find specially the amount allowed therefor. *Kansas City v. Bradbury*, 45 Kan. 381, 25 P. 889, 23 Am. St. Rep. 731.

(q-1) *Refusal of instruction inappropriate to the issues.*

The refusal of an instruction inappropriate to the issues is not prejudicial error. *R. Co. v. Caruthers* (Tex. Civ. App.), 157 S. W. 238.

(r-1) *Refusal to charge that health officer was required to treat all contagious diseases in the county.*

In a proceeding by a county health officer to determine the reasonableness of his salary, as fixed by the fiscal court, it was the officer's contention that he had exclusive charge of all contagious diseases in the county. The court instructed to find for the officer such sum as would be a reasonable salary, but refused to instruct further, whether the health officer was required to treat all contagious diseases in the county, or whether the fiscal court might also employ competent physicians to treat its indigent citizens so afflicted. Held, that all the evidence on this point, much of which tended to support the officer's contention, having been admitted, a refusal to give the further instruction was not prejudicial. *Trabue v. Todd Co.*, 31 Ky. L. R. 332, 102 S. W. 309.

(s-1) *Refusal to charge, when that given more favorable than that requested.*

Defendant requested an instruction, that if plaintiff was able to employ counsel and pay court costs to have the sale set aside, or by the use of ordinary care could have done so, and failed to make a reasonable effort, and such failure contributed to the damage, plaintiff was not entitled to recover damages other than the necessary costs. The court had instructed, on its own motion, that it was plaintiff's duty to take such measures as were in his power to make the injuries as light as possible, and that if the jury found it was in his power to lessen his damages by having the sale set aside, the measure of his

damage would be the amount it would cost to have the sale set aside. Held, that the refusal of defendant's requested charge was not prejudicial, the charge given being more favorable than that requested. *Western Union Tel. Co. v. Wofford*, 32 Tex. Civ. App. 427, 72 S. W. 620, 74 S. W. 943.

(t-1) *Defendant can not complain that court refused to give instructions asked by plaintiff.*

The defendant can not complain that the court refused to give instructions asked by the plaintiff. *R. Co. v. Powell*, 40 Ind. 37.

(u-1) *In action for diverting water to injury of crops, refusal to charge that plaintiff could recover the value of crops after deducting the cost of planting and raising.*

In an action for diverting water claimed by plaintiff for irrigation, plaintiff testified as to the market value of the water per inch, and that at that rate the damages during the time he had been deprived of it would amount to a certain sum. He testified as to the consequent loss of crops, and described what he had planted, and what they would have been worth. Held, that as defendant had full opportunity for cross-examination, and the verdict was only nominal, the refusal of the court to charge that plaintiff could only recover upon proof of what would have been the value of his crops after deducting the costs of planting and raising was not prejudicial. *Quigley v. P. Birdseye*, 11 Mont. 439, 28 P. 741.

(v-1) *Failing or refusing to give proper instruction where, in any event, appellant was not entitled to a favorable decision.*

Where it appears from the entire case that appellant is not entitled to a favorable decision in any event, a

reversal will not be granted for error in failing or refusing to give a proper instruction. *Power v. Sawyer*, 46 Me. 160; *Fisk v. Wilson*, 15 Texas, 430.

(w-1) *Refusal to submit question of fact when it appears that answer would be consistent with the verdict.*

The denial of a request to submit to the jury particular questions of fact, is not ground for reversal when it clearly appears that responsive answers to the questions, whatever they might be, would be entirely consistent with the general verdict returned. *Swift v. Wyatt*, 2 Kan. App. 554, 43 P. 984; *Bickford v. Champlin*, 3 Kan. App. 681, 44 P. 901.

(x-1) *Refusal to charge that client has a right to direct the course to be pursued by his attorney.*

In an action against an attorney for claimed breach of duty, any error in refusing to instruct that a client has a right to direct the course to be pursued by the attorney, held harmless. (N. H.) *Whitney v. Martin*, 192 F. 843, 113 C. C. A. 167.

(y-1) *Plaintiff entitled to recover independently of misinstruction or refusal to give instruction asked.*

Where plaintiff was entitled to recover independently of that referred to in the instructions, the refusal to give the instruction was not ground for reversal. *Insurance Co. v. Hendren*, 24 Grattan (Va.) 536, appeal dismissed, 92 U. S. 286.

(z-1) *Refusal to charge several propositions, where several of them were bad.*

It is not error to refuse a request to charge several propositions, if any of them are bad. *Consolidated Traction Co. v. Chenowith*, 58 N. J. L. 416, 34 A. 817.

- (a-2) *Refusal to charge excluding recovery for medicine or medical attention.*

In an action against a street railroad company for personal injuries, where the court, in charging the jury, limited plaintiff's recovery to reasonable compensation for her pain and suffering caused by the injury, the refusal to charge that no allowance was to be made for money alleged to have been paid or obligations incurred for medicine or medical attention was harmless error. *Dent v. Springfield Traction Co.*, 145 Mo. App. 61, 129 S. W. 1044.

- (b-2) *Refusal of instruction that the jury were the sole judges of plaintiff's credibility.*

Where, in an action against a street railway for injuries, plaintiff's only admission against his interest was that before attempting to cross the street he had not looked for the approaching car until it was so near to him that he could not avoid the collision, and the court instructed that, on the evidence, as a matter of law, plaintiff was guilty of negligence, refusal of an instruction that the jury were the sole judges of plaintiff's credibility, and that all statements made by him against interest must be taken as true, was not prejudicial to defendant. *Sep-towsky v. St. Louis Transit Co.*, 102 Mo. App. 110, 76 S. W. 693.

- (c-2) *In action against commercial agency, refusal to instruct that plaintiff could not recover because of excluded clause.*

Where, in an action by a merchant against a commercial agency, owing to defendant's having circulated a report that plaintiff was not in a sound financial condition, the court has refused to allow the jury to pass on a sentence in defendant's report, "They are behind and

can not meet current indebtedness," a refusal to instruct that plaintiff could not recover because of such clause was not prejudicial to defendant. *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668.

(d-2) *Refusal to instruct as to whom the employee informed of the defect.*

Where, in an action by an employee to recover for personal injuries sustained by reason of defective machinery, the court submitted to the jury the question, whether he informed the master, or the foreman in charge of the master's shop, of the defect in the machine before the injury, the refusal to submit the question requested by defendant as to whom the employee informed of the defect, was not prejudicial error where, on all the evidence, the person notified by the employee of the defect in the machine was a vice-principal of the master. *Dutzi v. Geisel*, 23 Mo. App. 676.

(e-2) *Refusal to give abstract instructions.*

A refusal to give instructions, which are merely abstractions, is not prejudicial. *R. Co. v. Cleary*, 77 Mo. 634, 46 Am. St. Rep. 13.

(f-2) *Refusal to instruct on material point, where, if given, the verdict would have been the same.*

A refusal to instruct the jury upon a material point will not be ground for reversal if the instruction asked could not have altered the verdict. *Douglass v. McAllister* (D. C.), 3 Cr. (U. S.) 298, 2 L. ed. 240.

(g-2) *Refusal of instruction as to notice, where none was given.*

A refusal of an instruction that notice of a certain fact would be enough to charge the defendant, without proof of other facts, is not ground of error, where there is no evidence of notice. *Mathews v. Renhardt*, 149 Ill. 635.

- (h-2) *Where only instruction prayed upon the evidence was one directing a verdict for plaintiff, defendant can not complain of refusal to give instructions requested by him.*

When the only instruction that was prayed upon the evidence was one directing a verdict for plaintiff, it would have been error to give instructions asked by the defendant, whatever their nature; hence, the defendant can not complain of the refusal to give the instructions requested by him. *Hart v. Green*, 16 Col. App. 70, 65 P. 344.

- (i-2) *Refusal to submit special questions to the jury.*

The court, on an ejectment trial, having directed the jury to find a verdict for the plaintiff, submitting to them special questions propounded as to the value of the premises and of the improvements, the refusal to submit special questions proposed by defendants upon other subjects is held not erroneous, for the reason that the answers would, under the circumstances, be immaterial under such a charge. *Brooks v. Fairchild*, 36 Mich. 231.

- (j-2) *In action for personal injuries, substitution of different instructions from those asked by defendant.*

Substitution by the trial court of a different instruction from one asked by the defendant, in an action for personal injuries, held not reversible error. *R. Co. v. Finchan*, 40 App. D. C. 412.

- (k-2) *Refusal of court to submit a question of fact to the jury, where evidence insufficient to establish it.*

That the jury erroneously refused to submit a question of fact to the jury is harmless, where the evidence offered by appellant was not sufficient to establish the fact in his favor. *Rogers v. Town of Swanton*, 54 Vt. 585.

Interrogatories and Instructions to the Jury. § 220

- (l-2) *Refusal to give instruction not supported by the evidence.*

The refusal of the court to give instruction not supported by evidence in the case can not be assigned for error. *Cowell v. Colorado Springs Co.*, 3 Col. 82; *Piele v. People*, 6 Col. 343.

Sec. 219. Repetition of correct principle of law.

- (a) *Repetition of a proposition of law in the instructions.*

The repetition of a proposition of law in the court's charge is not reversible error, unless it appears that it operated to the prejudice of the unsuccessful party. *R. Co. v. Sturey*, 55 Neb. 137, 75 N. W. 557; *Bank v. Thomas*, 46 Neb. 861, 65 N. W. 895; *Castelans v. R. Co.*, 149 Ill. App. 250.

- (b) *Improperly giving correct instruction already covered by others.*

The impropriety of giving a correct instruction on a question which was covered by other instructions given must be assumed not to have prejudicially misled the jury. *Melzner v. R. Co.* (Mont. Sup.), 127 P. 146.

Sec. 220. Title by prescription.

- (a) *Defendant failing to show prescriptive title by possession errors of court in rulings immaterial.*

A judgment for plaintiff in an action to recover land, in which the defense was adverse possession, will not be disturbed, notwithstanding errors that the court may have committed, where no prescriptive title was established by defendant's possession, and no possession was shown in her vendor, the premises being vacant when the latter acquired title. *Nunnalty v. Owens*, 90 Ga. 220, 15 S. E. 765.

- (b) *In a claim to land from adverse possession, claimant not prejudiced by introduction in evidence by the holder of the paper title of void assessments paid by him.*

Under Code of Civil Procedure, sec. 325, requiring one who claims by adverse possession not founded on any written instrument, to show payment of all taxes which have been levied and assessed upon the lands during the statutory period, when he admitted that he paid no taxes, and that there were no assessments other than those paid by the holder of the paper title, was not prejudiced by the introduction in evidence by the holder of the paper title of void assessments paid by him, as it would have been necessary for the adverse possessor himself to have introduced such void assessments in order to show that no valid assessments had been made. *Nathan v. Dierssen*, 146 Cal. 63, 79 P. 739.

- (c) *In action for partition, instruction that if defendant held the possession of such land "jointly, openly and exclusively" for the statutory period, etc.*

In an action for partition by a tenant against several of his co-tenants, in which the defendants set up the statute of limitations, an instruction, that if the defendants held possession of such land "jointly, openly and exclusively" for the statutory period, plaintiff was not entitled to recover, though erroneous in using the word "jointly," must be regarded as harmless, where the evidence clearly showed that the defendants' possession was not adverse to that of plaintiff. *Wrighton v. Butler* (Tex. Civ. App.), 128 S. W. 472.

- (d) *Charge on abandonment after maturity of prescriptive title.*

As title to land acquired by seven years adverse possession, under color of title, is not lost by subsequent

abandonment of possession, charges on abandonment after maturity of prescriptive title, if erroneous, are not prejudicial. *Mitchell v. Crummev* (Ga. Sup.), 67 S. E. 1042.

(e) *In action to recover land, instruction that plaintiff showed twenty years adverse possession in M after conveyance of his interest.*

Where, in an action to recover land, the issue was not whether plaintiff had been in possession for twenty years, but whether the possession for twenty years had been adverse or was permissive, an instruction that plaintiff showed twenty years adverse possession in M after conveyance of his interest in 1861, even if erroneous, was not prejudicial to plaintiff. *Carr v. Mougou*, 86 S. C. 461, 68 S. E. 661.

(f) *Charge detailing facts necessary to constitute adverse possession of wild lands, or ouster.*

In ejectment, a charge that to constitute an ouster or adverse possession of wild lands, it is not necessary that the one claiming possession should remain on the land, or that he should have any improvements thereon, and if he exercises acts of ownership, and has such possession as the land is susceptible of, such as cutting timber, keeping off intruders, paying taxes, offering to sell it, cutting trees off the land, selling trees off the land, cutting board timber off it, and giving persons permission to get wood and light wood off the lands, then such acts may constitute an actual adverse possession, did not instruct that the facts hypothesized amounted to adverse possession, but that they might do so, whether the party was in possession under a paper title or color of title, or not; and though the charge was not commendable, it was not reversible error. *Owen v. Moxom* (Ala. Sup.), 52 S. 527.

Sec. 221. Unduly emphasized instructions.

- (a) *Instruction placing undue emphasis upon a particular element of the cause in issue.*

Undue emphasis of a particular element in issue in the cause, while improper, will not reverse, in the absence of prejudice appearing. *Kearney v. Davin*, 162 Ill. App. 37.

- (b) *Unduly emphasized instruction cured by another.*

An instruction that unduly emphasizes the duty of the railroad company to the plaintiff is harmless, if followed by one clearly setting forth the corresponding duties of both the plaintiff and defendant. *Mitchell v. R. Co.*, 13 Wash. 560, 43 P. 528.

- (c) *Instruction unduly calling attention to an immaterial issue.*

If the fact to which attention is unduly called by instructions is immaterial to the issues, the judgment should not be reversed. *Bertram v. R. Co.*, 154 Mo. 639, 55 S. W. 1040.

Sec. 222. Vague, ambiguous, or improper instructions.

- (a) *Ambiguous instruction not followed by the jury.*

Where, in an action on a fidelity bond, the verdict returned was in strict accord with the proof touching the amount of the employee's embezzlement, and under no theory was defendant entitled to a credit which the jury disallowed, defendant was not entitled to a reversal because the disallowance of such credit was contrary to an ambiguous instruction with reference thereto. (Mo.) *Etna Indemnity Company v. J. R. Crowe Coal & Mining Co.*, 154 F. 545, 83 C. C. A. 431, writ of error denied, 207 U. S. 589; *Olsen v. Nebraska Telephone Co.* (Neb. Sup.), 127 N. W. 916.

- (b) *Ambiguity of instructions to the jury, which were not misleading.*

Where the instructions given by the court on its own motion are not misleading, the judgment will not be reversed merely because such instruction is ambiguous. *Gaff v. Stern*, 12 Mo. App. 115.

- (c) *Ambiguous charge in regard to taxed costs.*

The court charged that the plaintiff, who was not an attorney at law in this state, could not recover for taxed costs or for any services that inhered in the office of attorney, and later in the charge, with respect to certain exhibits, the jury was told that an account had been adjusted so that a promise to pay on the part of the defendants might be found, the plaintiff would be entitled to rely on that promise. There were services and questions of amount to which this language correctly applied. Held, that the express charge of the law of the case as to taxed costs and services as an attorney, was not withdrawn or superseded by the general expression of the latter clause, and that the court's attention not having been called to the possible ambiguity, the judgment will not be disturbed. *Brown v. Reddy*, 63 N. J. L. 589, 44 At. 935.

- (d) *Instruction insufficiently specific was not prejudicial.*

Where, in an action on an account stated, there was evidence that defendant retained the account for seven months after its rendition and prior to the commencement of the suit, without making any objection thereto, an instruction using the words, "for a considerable period of time," though erroneous, because not specific, constitutes no prejudicial error. *Kent v. Highleyman*, 28 Mo. App. 614.

- (e) *Unintelligible charge, which contained nothing vicious and was not calculated to mislead the jury.*

An unintelligible charge, which contained nothing vicious and was not calculated to mislead the jury, was not prejudicial. *Drewery v. R. Co.* (Tex. Civ. App.), 120 S. W. 1061.

- (f) *Want of precision in an instruction is not harmful, when there is no refusal of a more definite one.*

The mere want of precision in a charge is not harmful error, except in connection with the refusal of a more definite instruction. *Pelton v. Spider Lake Sawmill & Lumber Co.* (Wis. Sup.), 112 N. W. 29.

- (g) *Inexactness in the language of an instruction is not ground of reversal where the jury are not misled.*

Inexactitude in the language of an instruction is not ground for reversal where the jury are not misled. *Reams v. Clopine* (Neb. Sup.), 127 N. W. 1070.

- (h) *Vague instruction cured by another clearly expressed.*

An instruction is not of necessity prejudicially erroneous because its meaning is obscure, and although therein the burden of proof is unintelligibly defined, a cause will not therefore be reversed, when the record shows that another instruction was given which, with clearness, placed such burden upon the defendant in error. *Bingham v. Hartley*, 44 Neb. 682, 62 N. W. 1089.

- (i) *Lack of clearness in instructions not reversible error.*

Lack of clearness in instructions will not reverse, even though the jury may have had difficulty in arriving at their meaning, if, from a consideration of all the instructions, it does not appear that prejudice resulted. *Settle v. Threlkeld & Milburn*, 140 Ill. App. 275.

Sec. 223. When charge is on proposition of law not in the case.

- (a) *When the charge is on a proposition of law not in the case, either upon the pleadings or evidence, and which could not affect the result.*

If the court charges the jury erroneously upon a proposition of law which does not arise in the case, either upon the pleadings or the evidence, and which could not affect the result, is immaterial error, and will not cause a reversal of the judgment. *Satterlee v. Bliss*, 36 Cal. 489.

Sec. 224. When improper instruction is harmless.

- (a) *Erroneous instruction which applied only on collateral issues.*

The rule that a reversal will not be held because of the giving of erroneous instructions, which were harmless, applies only to errors in instructions on collateral issues, and not to a principal instruction which outlines the principle of law on which a recovery is sought. *Degonia v. R. Co.*, 224 Mo. 564, 123 S. W. 807.

- (b) *Improper instruction immaterial, where general verdict follows as the law upon the special findings.*

An improper instruction is not ground of error where the general verdict is such as the law would pronounce upon the special findings, and where the court can see that the special findings are not the result of the instruction. *Tuller v. Fox*, 46 Ill. App. 97.

- (c) *Erroneous instruction not unfavorable to appellant.*

An instruction that the jury should consider first, defendant's affirmative defense, and if it was supported by the evidence to find for defendant; and, if it was not, to consider the complaint, and if it was supported by the

evidence to find for plaintiff, was not unfavorable to defendant. *R. Co. v. Patterson*, 26 Ind. App. 295, 59 N. E. 688.

(d) *Error in instruction immaterial where no recovery is given.*

It is immaterial whether an instruction as to the amount of recovery is bad, when the jury, upon instructions, find against any recovery. *Wilkes v. Wolback*, 30 Kan. 375, 2 P. 508.

Sec. 225. When instruction without evidence is not erroneous.

(a) *When instruction to the jury without evidence is not erroneous.*

Where error is predicated upon the giving of an instruction to the jury upon the sole ground that, "there was no evidence upon which to justify it in several different points," no attack being made on the instruction, on the ground that it did not set forth the law correctly in the abstract, or that it invaded the province of the jury, intrenching upon the facts, or that it was erroneous in any particular, save in the one named, and we find that there was evidence to warrant the instruction, though there was much conflict therein, no error was committed in giving the instruction. *Walker v. Lee*, 51 Fla. 360; *R. Co. v. Arnol*, 46 Ill. App. 157; *Girard Coal Co. v. Wiggins*, 52 Ill. App. 69.

(b) *Instruction in action by architect authorizing recovery unbased on evidence.*

Where, in an action by an architect to recover for services in making plans for a building, the court weighed all the evidence, showing that the architect was employed by defendant to make the plans, an instruction authoriz-

ing a verdict for plaintiff if he, of his own motion prepared the plans, and then submitted them to defendant, who accepted them and promised to pay for them, was not prejudicial, though there was no evidence on which it could be based. *Link v. Prufrock*, 85 Mo. App. 618.

- (c) *Instruction dwelling upon the "weight" and "preponderance" of the evidence, where defendant introduced no testimony.*

It is harmless error for the trial judge to refer to the "weight" and "preponderance" of the evidence, where defendant introduced no testimony. *Joynes v. R. Co.*, 234 Pa. 321, 83 A. 318.

Sec. 226. When jury viewed the premises, charge that they might take what they observed into consideration.

- (a) *Where the jury in a damage case viewed the premises, instruction that they might take into consideration what they had observed.*

Where a jury was permitted to view the premises damaged, and the court instructed the jury that they might take into consideration what they had observed, together with the testimony introduced in the case, in making up their verdict, such instruction, while not approved, was harmless error, where the other evidence in the case was sufficient to sustain the verdict without a view of the premises. *R. Co. v. Pulaski Irrigating Ditch Co.*, 11 Col. App. 41, 52 P. 224.

CHAPTER VIII.

FINDINGS, VERDICT, MOTION FOR A NEW TRIAL.

- Sec. 227. Conclusions of law.
- 228. Conclusions of the court.
- 229. Findings.
- 230. Motion for a new trial.
- 231. Nonsuit.
- 232. Verdict.

Sec. 227. Conclusions of law.

(a) *Court's failure to separate its conclusions of law.*

Where appellants were not injured by the court's failure to separate its conclusions of law from the final decree, such failure was not reversible error. *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625.

(b) *Non-resident, alien heirs can not complain of errors in conclusions of law, who had no interest in the property which had escheated to the state.*

Where a special finding does not show that the owner of the land could pass it by descent when he died, if the Act of 1861 was then in force, his non-resident, alien heirs are not in a position to complain of errors of the conclusions of law, if they had no interest in the property, and that it had escheated to the state. *Donaldson v. State, ex rel. Taylor*, 167 Ind. 553, 78 N. E. 182.

(c) *Correct conclusions of law cured error in overruling demurrer.*

The error in overruling a demurrer to a complaint, on the ground of misjoinder of causes of action and for want of sufficient facts may be cured by correct conclusions of law

upon the facts found. *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254.

- (d) *Appellant having no interest in the litigation was unharmed by errors in the conclusions of law.*

Where it is found as a fact that appellant is not interested in the estate which is the subject of the action, he can not be regarded as prejudiced by any errors in the conclusions of law. *Hedges v. Kellar*, 104 Ind. 479, 3 N. E. 832.

- (e) *Appellate court will not examine in detail a holding on propositions of law.*

Where the trial court rejects a correct conclusion in its final judgment, an appellate court will not examine in detail the holding on propositions of law. *Ballance v. Peoria*, 70 Ill. App. 546.

- (f) *Errorncous conclusion of law that a certain act was negligence per se, where judgment justified by facts proved.*

In an action for damages resulting from negligence an erroneous conclusion of law that a certain act was negligence per se, is not prejudicial, where the judgment is justified by the facts proved. *R. Co. v. Batsell* (Tex. Civ. App.), 34 S. W. 1047.

- (g) *Failure of the trial judge to file specific conclusions of law.*

Where an agreed statement of facts was adopted by the trial court as its conclusions of fact, and the same was sent to the court of civil appeals as a full statement of facts to be considered on appeal, appellant was not injured by the trial judge's refusal to file specific conclusions of law. *Fidelity & Deposit Co. of Md. v. Bank* (Tex. Civ. App.), 106 S. W. 782.

(h) *Inconsistent conclusion of law, but judgment correct.*

The rule that a judgment will not be reversed because of inconsistent conclusions of law, where the judgment directed to be entered is in accordance with the correct conclusion of law upon the facts found. *Knox v. R. Co.*, 36 St. Rep. 2, 12 N. Y. Supp. 848, affm'd 128 N. Y. 625.

(i) *Erroneous conclusion of law, but judgment correct.*

An erroneous conclusion of law is not ground for reversal if the judgment is right. *Spencer v. Duncan*, 107 Cal. 425, 40 P. 549; *McCormick v. Sutton*, 78 Cal. 246, 20 P. 543.

(j) *Refusal to overrule questions calling for conclusions of law.*

The refusal of the court to overrule questions calling for conclusions of law is not reversible error, if the witness in response thereto states acts and conversation instead of giving any opinion of his own. *Taylor v. Thomas*, 17 Kan. 598.

(k) *Question calling for legal conclusion where witness states facts.*

The fact that the question addressed to the witness calls for a conclusion of law, is harmless error, where the witness's answer states only facts. *Bridgman v. Halberg*, 52 Minn. 376, 54 N. M. 752; *Goodrich v. McClary*, 3 Neb. 123.

(l) *Error in ruling out question and answer eliciting incorrect legal opinion.*

The court below ruled out a question to one of the witnesses and the answer thereto, "In what capacity did you place your name upon the note sued upon?" Answer, "As indorser," but permitted said defendant to testify fully as to the circumstances under which said indorsement was made, and which circumstances showed conclusively that he was

an original maker of the note. Held that, admitting the referee to have erred in the ruling, it was a harmless error. The incorrect legal opinion of the defendant could not have affected the judgment in the case. *McCallum v. Driggs*, 35 Fla. 277.

Sec. 228. Conclusions of the court.

(a) *Judgment will not be reversed because judge, in clear case, declared the true effect of the evidence instead of submitting it to the jury.*

Where the question is one that should be voted by the jury; yet, if the evidence is all one way and so satisfactory that the court would not sustain a verdict that might be found against it, the judgment will not be reversed merely because the judge declared the true effect of the evidence instead of submitting it to the jury. *Eister v. Paul*, 54 Pa. St. (4 P. F. Smith) 196.

(b) *Court fixing the penalty instead of leaving the question to the jury.*

Where, in an action under a statute prescribing penalties for soliciting insurance without a license, the court fixed the penalty at the lowest sum permitted; held, that defendant was not prejudiced even if it was error not to leave the fixing of the penalty to the jury. *State v. Farmer*, 49 Wis. 459, 5 N. W. 892.

(c) *Errorncous view of the law, but properly applied to facts.*

Where the question for decision before the trial court arises upon an undisputed state of facts, although the court may have proceeded upon erroneous views of the law, yet if, on the whole evidence, the judgment was a proper application of the law to the facts it can not be reversed. *Burnett v. W. U. Tel Co.*, 39 Mo. App. 599.

- (d) *Harmless error where judge decided correctly the question which should have been submitted to the jury.*

A new trial will not be granted because the judge decided a question which should have been submitted to the jury, if the judge decides the question rightly. *Greene v. Dingley*, 24 Me. (11 Shep.) 131.

- (e) *A correct conclusion is not to be overthrown, because it is reached by illogical reasoning or upon some false grounds.*

A correct conclusion is not to be overthrown because it is reached by illogical reasoning or upon some grounds which are false. *Little Pittsburgh Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Col. 223, 17 P. 760.

- (f) *On issue of fact submitted to the court conclusion is not reviewable.*

If a party submit an issue of fact to the court, instead of to a jury, its conclusion can not be reviewed any more than a verdict. *Utter v. Walker, Wright* (Ohio) 46; *Walworth v. Walworth, Wright* (Ohio) 673; *Reynolds v. Rogers*, 5 O. 169.

- (g) *Refusal of court to pass on written proposition of law not ground for reversal if judgment is clearly proper.*

The refusal of the court, on a trial without a jury, to pass on written propositions of law submitted, is not ground for reversal, if the judgment is clearly proper. *R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

Sec. 229. Findings.

- (a) *Court allowing to be filed an omitted finding upon the statute of limitations.*

After findings of fact filed and a judgment thereon

entered, the court can not properly cause to be filed an omitted finding upon the statute of limitations, and the judgment should not be reversed upon that ground, where the finding upon that issue is but a conclusion of law from the other facts found. *Richter v. Henningsan*, 110 Cal. 530.

(b) *Action on a complaint containing 892 counts aggregating \$72,330 and judgment, and finding by the court, entered for \$59,860.*

Where, in an action on a complaint containing 892 counts, the court found that all the facts set forth in the complaint were true and only one count was contained in the transcription appeal, under stipulations reciting that the aggregate amount of all the counts was \$72,330, and the aggregate amount of all others than those specially mentioned in the decision was \$59,680, for which latter amount judgment was ordered; it thereby appeared that judgment was given for the plaintiff only on the counts not specially mentioned; and hence, any conflict in the findings as to the specified counts was immaterial on defendant's appeal. *Bickerdike v. State*, 144 Cal. 686, 78 P. 270.

(c) *Judgment in favor of plaintiff fully sustained on one count will not be reversed for failure to find on other counts.*

Judgment in favor of plaintiff on one count, fully sustaining all findings, will not be reversed for failure to find on the other counts. *Hooker v. Thomas*, 86 Cal. 176, 24 P. 941.

(d) *Failure to find on issue raised by answer which did not constitute a valid counterclaim.*

Failure to find on issues raised by answer which did not constitute a valid counterclaim was not prejudicial error. *Reed v. Johnson*, 127 Cal. 538, 59 P. 986.

- (e) *Failure to find on plea of limitations where court finds facts showing that the action was not barred.*

Failure to find on plea of limitations is not reversible error, where the court finds facts showing that the action was not barred. *Ready v. McDonald*, 128 Cal. 663, 79 Am. St. Rep. 76, 61 P. 272.

- (f) *On two causes of action, one for commissions and one for work and labor, but all evidence directed to the first, failure to find on the second count.*

Where plaintiff in an action for commissions on a sale alleged to have been effected as broker, joined with his complaint for breach of a special contract, a second count for work and labor, but all his evidence was addressed to the alleged contract and sale under it, a failure to find on the second count is not cause for reversal. *Ropes v. John Rosenfeld's Sons*, 145 Cal. 671, 79 P. 354.

- (g) *Where plaintiff could not possibly recover, he can not complain of absence of finding on issue raised by intervenor.*

Where plaintiff under the case actually made could not possibly recover, he can not complain of absence of finding on the issue raised by the intervenor. *Paiser v. Griffin*, 125 Cal. 9, 57 P. 690.

- (h) *Special finding of fact as to one paragraph renders overruling of demurrer to two not prejudicial.*

Overruling of demurrers to each of two paragraphs of a complaint is harmless error where one of the paragraphs is sufficient; but the court may specially find the fact with respect to the other paragraphs. *R. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641; *R. Co. v. Cox*, 43 Ind. App. 736, 86 N. E. 1032; *Doty v. Patterson*, 155 Ind. 60, 56 N. E. 668; *Talbott v. Town of Newcastle*, 169 Ind. 172, 81 N. E. 724:

Barnett v. Thomas, 36 Ind. App. 441, 95 N. E. 868, 114 Am. St. Rep. 385; Turpie v. Lowe, 158 Ind. 47, 62 N. E. 628; Walling v. Burgess, 122 Ind. 299, 23 N. E. 1076, 7 L. R. A. 481.

(i) *If findings substantially cover the issues, immaterial that they are clumsily drawn and contain ambiguity, due to bad spelling.*

If findings substantially cover the issues, the fact that they are clumsily drawn and contain ambiguity, due to erroneous spelling, is not cause for reversal. Thompson v. Brannan, 76 Cal. 619, 18 P. 783.

(j) *Including probative facts in finding not reversible error.*

Including probative facts in finding is not prejudicial error. Smith v. Taylor, 82 Cal. 544, 23 P. 217; Whitesides v. Briggs (Cal.), 7 P. 838.

(k) *Judgment not reversed for finding alone, unless shown that no such judgment could properly be rendered.*

A judgment will not be reversed for finding alone, unless it is shown affirmatively that no such judgment could properly have been rendered. Semple v. Cook, 50 Cal. 26.

(l) *In action against a county to quiet title to a certain road and bridge thereon, agreed finding that there was a dedication thereof, further finding may be rejected as surplusage.*

Where, in an action against a county to quiet plaintiff's title to a certain road and bridge thereon, there is an agreed finding that there was a dedication of said road and bridge, a further finding in favor of defendant on plea of the statute of limitations is not prejudicial to plaintiff, as it may be rejected as surplusage, and still the judgment is supported by the finding of dedication. Sussman v. County of San Luis Obispo, 126 Cal. 536, 59 P. 24.

(m) Special finding supplied fact wanting in the complaint.

Where a complaint alleged that defendants were in the unlawful possession of certain real estate and wrongfully detained the same "from the possession of the property," the overruling of a demurrer to the complaint was harmless, if there was a specific finding that supplied or found the existence of the fact missing or wanting in the complaint. *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; *R. Co. v. Yawger*, 24 Ind. App. 460, 56 N. E. 50.

(n) Immaterial error in finding of fact by the court.

An error in the finding of fact by the court, which is entirely immaterial, and works no injury to anyone, will be disregarded on appeal. *Leonard v. Green*, 34 Minn. 137, 24 N. W. 915; *Quinn v. Olson*, 34 Minn. 422, 26 N. W. 230.

(o) Where the complaint avers that plaintiff is a corporation, a conflict in the finding thereon is immaterial, the incorporation not being in issue.

Where the complaint avers that the plaintiff is a corporation, and defendant avers the same facts in the answer, a general finding that the averments of the complaint are true and the averments of the answer untrue, will not require a reversal of the judgment for contradictory finding, there being no issue as to the existence of the corporation. *Bank of Lassen Co. v. Sherer*, 108 Cal. 513, 41 P. 415.

(p) In action for the price of a pumping outfit, where parties agreed to a substitution not contemplated by contract, finding that the work had been completed according to the original contract.

In an action for the price of a pumping outfit, in which it appeared that the parties agreed to the substitution of a kind of pump-head not contemplated by the original contract, a finding that the work had been completed according

to the original contract was harmless. *Boothe v. Squaw Springs Water Co.*, 142 Cal. 573, 76 P. 385.

(q) *Judgment will not be reversed for failure to find on a material point, which must have been found against appellant.*

Judgment will not be reversed for failure to find on a material point which, if made, must be against appellant. *White v. White*, 82 Cal. 427, 23 P. 276.

(r) *Failure to find on issue on which there is no evidence.*

Failure to find on issue on which there is no evidence is harmless. *Christy v. Spring Valley Water Works*, 84 Cal. 544, 24 P. 317; *Cutting F. P. Co. v. Canty*, 141 Cal. 696, 75 P. 564.

(s) *Finding that all the allegations in the complaint not specifically found are true, and in answer untrue, does not require reversal, where specific allegations not found would have been adverse to appellant.*

A finding that all the allegations in the complaint not specifically found on are true, and the allegations in defendant's answer not specially found on are untrue, does not require a reversal where it appears that specific finding on the allegations not directly found upon would have necessarily been adverse to appellant. *O'Connor v. Clarke* (Cal. Sup.), 44 P. 482.

(t) *Where overdrafts have become barred by limitations, the failure of the court to find the separate amounts of such overdrafts does not affect the result.*

Where overdrafts by defendant have become barred by the statute of limitations, the failure of the court to find accurately the separate amounts of such overdrafts does not affect the result, as it does not change the nature of the account. *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 58 P. 85.

- (u) *The supreme court will not reverse for failure to make a finding of facts on a material issue, unless such finding would work a reversal in favor of appellant.*

The supreme court will not reverse for failure to make a finding of facts on a material issue, unless such a finding in favor of appellant would work a reversal. *Blochman v. Spreckels*, 135 Cal. 662, 67 P. 1061.

- (v) *Failure of the court to make findings not prejudicial where, if court had found in favor of plaintiff thereon it would have increased defendant's liability, and if otherwise it would not have affected the amounts found due to plaintiff.*

Failure of the court to make a finding with reference to the particular cause of action sued on, was not prejudicial to defendants where, if the court had found in favor of plaintiffs thereon, it would have increased defendant's liability, and, if the court had found in their favor, such finding would not have affected the amounts found due to plaintiff, on its cause of action separately sued on, on which the judgment was rendered. *John A. Roebbling's Sons Co. v. Gray*, 139 Cal. 607, 73 P. 422.

- (w) *In action for the delivery of certain crops, where it was found a chattel-mortgagee had superior right thereto, and after paying his claim there was no surplus for distribution, failure to find on issues of other parties was harmless.*

In an action of claim and delivery for certain crops where, under the facts found, defendant, a chattel-mortgagee, had a superior right to the crops; after satisfying his claim there would be no surplus for distribution to the other parties, the failure of the court to find on the issues raised as to the respective rights of such other parties was harmless error, and insufficient to justify a reversal. *Summerville v. Kelliher*, 144 Cal. 155, 77 P. 889.

- (x) *Failure to find on a particular issue, where any finding would have been adverse to party complaining.*

Failure to find on a particular issue held harmless where, any finding that could have been made would have been adverse to the party complaining. *Bank v. Bank* (Cal. App.), 86 P. 820.

- (y) *The same weight attachable to findings of the court as to the verdict of a jury.*

The appellate court will give the same weight to a finding of the court which is given to the verdict of a jury. *McBride v. Steiner*, 68 Ill. App. 260; *Tolman v. Roberts*. 72 Ill. App. 114; *Dove v. Ind. School Dist.* 41 Iowa 689; *In re Will of Donnelly*, 68 Iowa 126.

- (z) *Denial of request for separate findings of fact and law must be shown to have resulted prejudicially.*

It must appear that the denial of a request to state findings of fact and conclusions of law separately has prejudiced the substantial rights of the party making the request, to warrant a reversal because of such denial. *Eble v. State*, ex rel. *Bond*, 77 Kan. 179, 93 P. 803.

- (a-1) *Error as to effect of alleged settlement cured by finding that there was no such settlement.*

The error, if any, as to the effect of an alleged settlement was not prejudicial to plaintiff, where the jury found for defendants on their counterclaim an amount in excess of that which they were directed to find, in the event they found such settlement had been made, and thus found in effect that there had been no settlement. *Gallimore v. Brewer*, 22 Ky. L. R. 296, 57 S. W. 253.

- (b-1) *Neglect of the court in special findings to pass upon some points of law.*

A judgment will not be reversed because the court below,

in a special finding, neglected to pass specifically upon some points of law presented to him which were not material to the case, or because he found incorrectly upon some preliminary findings, worked no legal prejudice to plaintiff in error, and the final conclusion was such as a true view of the facts and law really required. *Eastern School Dist. No. 4 v. Snell*, 24 Mich. 350.

(c-1) *Finding not supported by evidence, but not prejudicial.*

In an action to set aside a mortgage on land executed by defendant, the court found that the land was conveyed to defendant by plaintiff and her husband, and that defendant executed a reconveyance thereof to plaintiff, and placed the same in escrow. The court also found that the deed of plaintiff and her husband to defendant was to secure notes due defendant. Held, that plaintiffs could not complain of the latter finding, though unsupported by the evidence, as it was not prejudicial. *Giersten v. Giersten*, 58 Minn. 213, 59 N. W. 1004.

(d-1) *Inadvertent defect in court's finding will not reverse.*

A judgment will not be reversed for a defect in the judge's finding, which a stipulation in the record shows was purely inadvertent, and that the fact which could have been found existed. *Sherrid v. Southwick*, 43 Mich. 515, 5 N. W. 1027.

(e-1) *Where plaintiff could not succeed, refusal to find on all the points presented was harmless.*

Where a finding in favor of the plaintiff on all points presented could not have established his right to a judgment, the case can not be treated as one of mistrial for refusal to find on all of them. *Wiley v. Lovely*, 46 Mich. 83, 8 N. W. 716.

(f-1) *Additional findings, not supported by evidence, did not call for a reversal.*

Where the findings of fact made by the court justified the conclusion of law, but at the request of appellant's counsel the court made additional findings of fact, which would make the inference of fraud inevitable in transactions which the court found were free from fraud; held, that the additional findings, not supported by the evidence, did not call for a reversal. *London v. Martin*, 79 Hun 229, 61 St. Rep. 24, 29 N. Y. Supp. 396, *affm'd*, 149 N. Y. 586.

(g-1) *Evidence insufficient to disturb finding for defendant.*

In an action against Buckland, as surviving partner of the firm of Buckland & Bethel, it appeared in evidence that, in addition to the business of the firm, each of the partners was also engaged in separate business on his own account; that Bethel, being about to depart for San Francisco, with the intention of laying in a stock of goods for the firm. Roney delivered to him a package of United States Treasury notes and securities; that on his way to San Francisco Bethel lost his life; that after B.'s death Roney endeavored to collect his claim from his estate, and it did not appear what had become of the notes and securities after their delivery to B. Held, that the evidence to show that he delivered to or for the firm was too meager to justify a disturbance of the finding of the court below in favor of the defendant. *Roney v. Buckland*, 5 Nev. 219.

(h-1) *Finding of court upheld, though supreme court would make a different one.*

So long as there is evidence to support a finding made by the trial court, it will not be reversed, though the supreme court would make a different finding on the question if presented new. *Baker & Hamilton v. McAllister*, 2 Wash. T. 48.

(i-1) *Findings stating, "Interrupting the free passage of light and air to and from plaintiff's premises, and to and from adjoining premises," did not harm defendants.*

Where damages were awarded a passenger, the finding stating, among other things, in "interrupting the free passage of light and air to and from plaintiff's premises and to and from adjoining premises;" held that, although the last six words of the finding were improperly there, since no damages are allowable for the interruption of light and air to and from adjoining premises, yet, as it appeared from an examination of the evidence and findings that the damages were allowed solely because of the depreciation of plaintiff's property, defendants were not harmed. *Woolsey v. R. Co.*, 31 St. Rep. 91, 9 N. Y. Supp. 133, reformed, 47 St. Rep. 633, modified, 134 N. Y. 323, 43 St. Rep. 474.

(j-1) *Erroneous finding not affecting the merits of the case.*

Findings erroneous when received, which do not affect the merits of the case, will be disregarded. *Boskowitz v. Davis*, 12 Nev. 446; *Cornell v. Barnes*, 26 Wis. 473.

(k-1) *Immaterial that special findings did not comprehend all the issues.*

When answers to special interrogatories, when taken together, were not inconsistent with a general verdict, but supported it, it was immaterial that such special findings did not comprehend all the issues. *R. Co. v. Head*, 80 Ind. 117.

(l-1) *Error in findings immaterial unless different judgment will follow correction.*

Error in the court's findings of fact immaterial unless correction will lead to a different judgment. *Hoadley v. Bank*, 71 Conn. 599, 42 A. 667, 44 L. R. A. 321; *Weed v. R. Co.*, 119 Ga. 576, 46 S. E. 885; *Mathews v. Whitehorn*, 220 Ill. 36, 77 N. E. 89; *Grogan v. Valley Trading Co.*, 30 Mont.

229, 76 P. 211; Kennett v. Hopkins, 69 N. Y. Supp. 18, 58 App. Div. 407, affm'd, 175 N. Y. 496, 67 N. E. 1084; Hege v. Thorsynard, 98 Wis. 11, 73 N. W. 567.

(m-1) *Jury determine credibility of witnesses and their findings thereon should not be disturbed.*

It is the province of the jury to determine the credibility of witnesses, and their finding should not be disturbed on this ground. Andrews v. Watson, 51 O. S. 619.

(n-1) *Findings of jury on questions of negligence and contributory negligence will not be disturbed.*

Court will not disturb the findings of a jury on questions of negligence and contributory negligence, though they may come to a different conclusion, these questions being peculiarly for the jury. Lawrence v. R. Co., 13 Dec. Repr. (O.) 487, 1 C. S. C. R. (O.) 180.

(o-1) *Where there was no evidence showing alleged statement of facts failure of the jury to make a finding thereof was immaterial.*

Failure to make a finding of fact is harmless, where there was no evidence showing such state of facts as would make such finding material to appellant. Slocumb v. Thatcher, 20 Mich. 52.

(p-1) *Finding on one allegation sufficient to sustain judgment for defendant, other findings immaterial.*

A general finding that each and all of the allegations of the complaint are untrue, is equivalent to a special finding as to each allegation, that it is untrue; hence, if the finding is justified by the evidence as to one allegation, which alone, and independently of the others, would justify the conclusions of law in favor of defendant, the fact that the finding as to some other allegations is unsupported by the evidence is error without prejudice. Fidelity & Casualty Co. of N. Y. v. Grays, 76 Minn. 450, 79 N. W. 531.

(q-1) *Error in instructions cured by special findings by the jury.*

Where the jury has, by special findings, determined every fact necessary to authorize judgment, error in giving or refusing instructions as to the legal conclusions to be drawn from such facts will constitute error without prejudice. *Boals v. George*, 30 Iowa 601; *Hall v. Carter*, 74 Iowa 364; *Graham v. Stewart*, 68 Cal. 376, 9 P. 555; *Reddick v. Kessling*, 129 Ind. 128, 28 N. E. 316; *R. Co. v. Paul*, 28 Kan. 816; *R. Co. v. Holman*, Id.; *Head v. Dyson*, 31 Kan. 74, 1 P. 258; *City of Clay Center v. Jevons*, 2 Kan. App. 568, 44 P. 745; *R. Co. v. Lost Springs Lodge*, 74 Kan. 847, 85 P. 803; *R. Co. v. Kuhn*, 86 Ky. 578, 9 Ky. L. R. 925, 6 S. W. 441, 9 Am. St. Rep. 309; *Corcoran v. Batchelder*, 147 Mass. 541, 18 N. E. 420; *Cook v. Canny*, 96 Mich. 398, 55 N. W. 987; *Germaine v. Muskegon*, 105 Mich. 213, 63 N. W. 78; *McAdow v. Black*, 6 Mont. 608, 13 P. 377.

(r-1) *Where plaintiff remitted from judgment to prevent new trial, defendant not injured by erroneous finding of fact as to some of his allegations.*

Where the defense made to an action to recover a balance due on a lease was, that the lease had been procured by fraudulent representations, and the amount of damages attempted to be proved by defendant was remitted by plaintiff from his judgment, as a condition for refusing a new trial, defendant is not injured by an erroneous finding of fact as to some of his allegations in his answer. *Hamilton v. Smith*, 125 Cal. 530, 58 P. 130.

(s-1) *Where court finds that damage has been fully compensated, no injury results from erroneous finding as to the damages.*

Where, in trespass, the court properly finds that the damage, whatever it was, has been fully compensated, no injury

results from findings which failed to place the damages at the extent shown by the evidence and find the trespass not wrongful. *Wagoner v. Silva*, 139 Cal. 449, 73 P. 433.

(t-1) *Failure to find on the allegations as to the termination of a lease, not reversible error.*

Where plaintiff, in an action for unlawful detainer, alleges that the term for which the lands were demised had expired, which allegation is denied, but the real issue is, whether the lease had been extended; in the absence of a showing, or a plain inference, that a failure to find on the allegations of the termination of the lease was injurious, such action will not be reversed on appeal. *Schweikert v. Seavey*, 130 Cal. xviii, 62 P. 600.

(u-1) *Where special findings embrace all material issues of fact, rulings upon questions of evidence disregarded.*

In case special findings are submitted to the jury, under Code of Special Procedure, secs. 1187, 1188, which embrace all material issues of fact, and are answered, rulings upon questions of evidence, not relevant to the findings submitted, are to be disregarded on appeal, and so are exceptions to refusals to charge, unless the requests are germane to the questions submitted. *Bank v. Delafield*, 80 Hun 564, 62 St. Rep. 534, 30 N. Y. Supp. 600, aff'd, 152 N. Y. 624; *Girdner v. Beswick*, 69 Cal. 117, 10 P. 278; *Snodgrass v. Parks*, 79 Cal. 61, 21 P. 429; *Bucker's Irr. Mill & Impr. Co. v. Farmers' Ind. D. Co.*, 31 Col. 62, 72 P. 49; *Moore v. State, ex rel. Ferguson*, 43 Ind. App. 387, 84 N. E. 161; *R. Co. v. Martin*, 59 Kan. 437, 53 P. 461, affm'd, 178 U. S. 245; *R. Co. v. Hart*, 7 Kan. App. 550, 51 P. 933; *Chandler v. Harper*, 85 Kan. 860, 70 P. 368.

- (v-1) *Finding not reversed because court refused defendant's instructions that bill of lading should be construed by the laws of Missouri.*

Where, in a suit to recover damages for the loss of certain cotton delivered to a railroad company in Texas for shipment, the court placed finding for plaintiff, on the ground that the cotton was lost, by reason of the negligence of the defendant or of the cotton compress company; the finding will not be reversed for error in refusing the defendant's instruction that the bill of lading, being a through one, from Texas to Massachusetts, should be construed by the laws of Missouri, where the action was brought. *Otis Co. v. R. Co.*, 112 Mo. 622, 20 S. W. 676.

- (w-1) *Instruction that failed to tell the jury in specific terms that their findings must be based on the evidence.*

While an instruction should tell the jury in specific terms that their finding as to damages must be based on the evidence, an instruction which did not so inform the jury is not prejudicial error, where the instruction was otherwise correct, particularly as the jurors, when sworn, were required to take an oath to try the case and render a true verdict according to the law and the evidence. *R. Co. v. Hydrick* (Ark. Sup.), 160 S. W. 196.

- (x-1) *Finding of jury rendered instruction relating to issuance of mittimus unimportant.*

Where the issue was, whether a judgment had been rendered before or after a mittimus was issued, an instruction which undertook to state the law and to define the rights of the parties, in the event the jury should be of opinion that the mittimus was issued before the judgment was rendered, need not be considered on appeal, since, if erroneous, it was harmless, the jury having found that the judgment was

rendered first. Van Vleck v. Thomas, 9 Ind. App. 83, 35 N. E. 913.

(y-1) *Where decree did not include certain mortgaged wine, finding that none of mortgaged property was released from mortgages, though inconsistent, not reversible error.*

Where there was neither an estoppel against plaintiff's maintaining an action to foreclose a mortgage on part of the mortgaged property, nor a novation as to the obligations secured by the mortgages, and the decree of foreclosure did not include certain mortgaged wine sold with the mortgagee's consent, a finding that under the contract of sale none of the mortgaged property was released from the mortgages, though inconsistent, does not constitute reversible error, since it is immaterial. Carpy v. Dowdell, 131 Cal. 495, 63 P. 778.

(z-1) *Want of finding to support an allowance of attorney's fees becomes immaterial where appeal from that part of decree is dismissed.*

The want of a finding to support an allowance of attorney's fees becomes immaterial, where the appeal of the corporation from that part of the decree making the allowance is dismissed. Fox v. Hale & Norcross Silver Min. Co., 108 Cal. 475, 41 P. 328.

(a-2) *Failure of court to find as to right to an injunction, not available to defendant on appeal from judgment for damages.*

In a suit for damages and for an injunction, the failure of the court to find upon the issue as to the right to injunction gives defendant no ground of complaint on an appeal from a judgment for damages without an injunction. Rooney v. Gray, 145 Cal. 753, 79 P. 523.

(b-2) *That findings are classified as conclusions of law is not ground for reversal.*

The fact that findings are classified as conclusions of law is not ground for reversal. *Millard v. Supreme Council*, 81 Cal. 342, 22 P. 864.

(c-2) *Judgment will not be reversed for failure to find upon certain issues in a case, where finding on all would not require a different judgment.*

A judgment will not be reversed for failure to find upon certain issues in the cause, if a finding upon all the issues would not require a different judgment. *Johnson v. Perry*, 53 Cal. 351; *Robinson v. Placeinville R. Co.*, 65 Cal. 263; *Robinson v. Muir* (Cal. Sup.), 90 P. 521; *Musket v. Fay* (Cal. App.), 91 P. 534.

(d-2) *Judgment will not be reversed for want of finding on issue as to which there is no evidence, and which is not necessary to sustain the judgment.*

Judgment will not be reversed for want of finding on an issue, as to which there is no evidence, and it is not necessary to sustain the judgment. *Himmelman v. Henry*, 84 Cal. 106, 23 P. 1098.

(e-2) *Erroneous special finding harmless where judgment would be the same without it.*

Where the judgment would be the same, if the special finding were eliminated, such finding, though erroneous, was harmless. *R. Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794.

(f-2) *Where erroneous finding is not made the basis of the judgment rendered it is harmless error.*

Where an erroneous finding is not made the basis of the judgment rendered it is harmless error. *Thomason v. Carroll*, 132 Cal. 148, 64 P. 262.

- (g-2) *That express findings do not support judgment does not authorize a reversal of the judgment, unless inconsistent therewith.*

The mere fact that express findings do not support the judgment does not authorize a reversal of the judgment. The findings must be inconsistent with the judgment or it will be allowed to stand. *Mathews v. Kinsell*, 41 Cal. 512.

- (h-2) *Findings of court inconsistent with the judgment, but not a part thereof, not reversible error.*

Where the findings by the court are no part of the judgment and are clearly against the undisputed testimony, they will not require reversal, though inconsistent with the judgment. *Ocean Accident & G. Corporation v. Joslin Dry Goods Co.* (Col. App.), 146 P. 790.

- (i-2) *A judgment will not be reversed for want of finding, unless there was evidence which required the court to make a finding countervailing its other findings.*

A judgment will not be reversed for want of a finding, unless it appear that there was evidence from which court was required to make a finding countervailing its other findings. *Bliss v. Sneath*, 119 Cal. 529, 51 P. 848.

- (j-2) *When court's special findings support the judgment it will be affirmed.*

Where the court's special findings embrace substantially all the material facts averred in the second paragraph of the complaint and such findings sustained the court's conclusions of law therein, the sufficiency of the complaint will be affirmed. *Rohrof v. Schulte*, 154 Ind. 183, 55 N. E. 427.

- (k-2) *Error in one paragraph harmless, when there is sufficient finding on another to sustain the judgment.*

Where the jury finds for plaintiff on both of two inde-

pendent paragraphs of the complaint, the judgment will not be reversed for error in the finding on the second paragraph, if that on the first paragraph is proper. *R. Co. v. Roberts*, 161 Ind. 1, 67 N. E. 530.

(l-2) *Where there is no error in findings of fact, or in the judgment, erroneous declarations of law will be disregarded.*

Where there is no error in the findings of fact, nor in the judgment, in a case tried by the court, it will be affirmed, though the declarations of law in the case are erroneous. *Keith v. Freeman*, 43 Ark. 296.

(m-2) *An erroneous finding as to the location of a mining claim will not be reversed if the judgment be supported by evidence on the other findings.*

In an action to determine the right of possession of a mining claim, an erroneous finding as to the location of the premises in the controversy will not warrant a reversal, if the judgment be conclusively supported by the evidence on the other findings. *Duryea v. Boucher*, 67 Cal. 141, 7 P. 421.

(n-2) *A judgment will not be reversed upon the ground of a conflict in the findings, unless irreconcilably so.*

Findings are to be liberally construed in support of a judgment and if possible are to be reconciled so as to prevent any conflict upon material points, and, unless the conflict is clear and the findings are incapable of being harmoniously construed, a judgment will not be reversed upon the ground of a conflict in the findings. *Ames v. San Diego*, 101 Cal. 390, 35 P. 1005.

(o-2) *Where a binding judgment is supported by evidence, the fact that other findings are not so supported is immaterial.*

Where an absolutely binding judgment against appellant

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is supported by evidence, the fact that other findings are not so supported is immaterial. *Wheat v. Bank*, 119 Cal. 7, 50 P. 842.

(p-2) *It was immaterial that the finding that the assignment of a mortgage was pursuant to a judgment declaring it to be the property of the estate, is not supported by the evidence, being shown to be the property of the estate.*

It is immaterial that the finding that the assignment of a mortgage by the attorney of an estate to its administrator was pursuant to a judgment declaring it to be the property of the estate, was not supported by the evidence, the evidence showing it to be the property of the estate. *Ambrose v. Drew*, 139 Cal. 665, 73 P. 543.

(q-2) *Failure to find upon all material issues not prejudicial error, where the court finds upon an issue the determination of which controls the judgment.*

Failure to find upon all material issues is not prejudicial error, where the court finds upon an issue the determination of which controls the judgment, and where a finding in favor of the appellant upon every other issue would not justify a contrary judgment. *Windhaus v. Bootz*, 92 Cal. 617, 28 P. 557; *R. Co. v. Dufour*, 95 Cal. 615, 30 P. 783; *Morrill v. Morrill*, 102 Cal. 317, 36 P. 675.

Sec. 230. Motion for a new trial.

(a) *The propriety of granting or refusing new trials is a question that is left entirely to the discretion of the trial judge.*

The question of the propriety of granting or refusing new trials is one that must be left entirely to the discretion of the judge who tries the case and has heard the evidence. The practice of reviewing the decisions of inferior courts upon motions for new trials is wholly unknown to the judi-

cial system of this country. *Carter v. Bennett*, 4 Fla. 283; *Freeman v. Rich*, 1 Iowa 504; *Pickering v. Kirkpatrick*, 32 Iowa 162.

(b) *If the jury find a fact from improper evidence, a new trial will not be granted if proper evidence shows conclusively the existence of the fact.*

If the jury are allowed to find a fact from improper evidence a new trial will not be granted if proper evidence shows conclusively the existence of the fact. *Earl v. Shoulder*, 6 O. 409.

(c) *New trial refused where verdict is right.*

A new trial will not be granted where the verdict is right on the substantial merits. *Hidell v. Funkhauser*, 96 Ga. 85; 51 Ga. 583; 99 Ga. 270; 56 Ga. 311; 91 Ga. 617.

(d) *In action for negligently killing husband, evidence of children deceased left not ground for a new trial.*

In an action by a wife under the Code, sec. 2971, for the killing of her husband, though the number of minor children or their means of support is not in issue, and evidence of such fact is irrelevant, its admission is not ground for a new trial. *R. Co. v. Rouse*, 77 Ga. 393, 3 S. E. 307.

(e) *Irrelevant proof of business habits and character of judgment debtor not ground for a new trial.*

In an action on a judgment, the fact that the general business habits and character of the judgment debtor are admitted in evidence on the issue of payment, is not ground for a new trial. *Baker v. Stonebraker*, 36 Mo. 338.

(f) *Incompetent evidence in rebuttal of incompetent evidence is not ground for a new trial.*

The allowance of incompetent evidence in rebuttal of evidence also incompetent is not ground for a new trial. *Harrington v. R. Co.*, 17 Minn. 215.

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(g) *New trial denied when sought to set up harsh defenses.*

Where a policy of insurance required action to be brought within six months, but it was not brought until thirteen months, and the jury found for the plaintiff, it was held that a reviewing court will not reverse for the purpose of allowing a second chance to insist on a harsh defense, merely because not supported by the weight of the evidence. *Insurance Co. v. Giell*, 16 O. C. C. 294, 9 O. C. D. 162. So of denial of amendment to set up unconscionable demand, *Daley v. Russ*, 86 Cal. 114, 24 P. 867.

Sec. 231. Nonsuit.

(a) *Dismissal without a formal motion therefor where cause of action incapable of amendment so as to state one.*

Where the court sustained an objection to evidence on the ground that the complaint did not state a cause of action, dismissed the action, and plaintiff's counsel, who was present, did not object, and the complaint could not have been amended so as to state a cause of action, the dismissal, without a formal motion for that purpose, did not prejudice the plaintiff. *Justice v. Robinson*, 142 Cal. 199, 75 P. 776.

(b) *That the grounds for a non-suit were not specific was harmless where the defects in the case could not have been cured if attention had been specifically called to them.*

That the grounds stated in a motion for a non-suit were not sufficiently specific was harmless, where the defects in the case could not have been cured if attention had been specifically called to them. *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 P. 580; *Cane v. Hannah*, 2 Kan. 490.

(c) *Refusal to grant non-suit, where defendant supplied lacking evidence.*

A refusal to grant a non-suit, on the ground that plaintiff

having alleged an express contract and had failed to prove it, was not reversible error where defendant afterwards supplied the lacking evidence by introducing the contract. *Davis Bros. v. R. Co.*, 81 S. C. 466, 62 S. E. 856; *Rissell v. Pacific Can Co.*, 116 Cal. 530, 48 P. 616; *Levy v. Wolf* (Cal. App.), 84 P. 313; *Bennett v. N. P. Exp. Co.*, 12 Ore. 49.

(d) *In action for conversion, refusal of non-suit cured by subsequent proof of contract.*

Where, in an action for conversion of certain shelving, defendants claimed that the same was fixtures and passed with the property on termination of a lease by the former owner, error, if any, in refusing to grant a non-suit at the close of plaintiff's case, on the ground that plaintiff's evidence established that the shelving was fixtures, was cured by subsequent proof of a contract between the landlord and the tenant by which the former agreed to permit the shelving to remain on the premises while the tenant was endeavoring to make a sale thereof. *Farnsworth v. Miller* (N. J. L.) 60 A. 1100.

(e) *Erroneous denial of non-suit cured by subsequent evidence supplying omission.*

Where a non-suit was erroneously denied, after which sufficient evidence was admitted to supply the omission in plaintiff's proof, the error was cured. *Hill v. Clark* (Cal. App.), 95 P. 382; *Jennings v. Trummer* (Ore. Sup.), 96 P. 874.

(f) *Irregularity of the court in making a special finding after granting a non-suit, where latter was properly granted.*

Irregularity in the action of the court in making special findings, after granting a non-suit, is harmless, where the non-suit was properly granted. *In re Morey's Est.*, 147 Cal. 495, 82 P. 57; *Morey v. Wells*, 147 Cal. 495.

(g) *Denial of motion to non-suit and to direct a verdict not erroneous.*

The plaintiff, while out driving with a party of four others in the early morning, on a hunting trip, was injured in a collision with one of defendant's trains, while crossing its tracks. They were in a plumber's wagon drawn by a single horse. The plaintiff's evidence tended to prove that it was quite dark at the time; that the party halted their horse about twenty feet from the track, to look and listen for trains, and not seeing nor hearing any bell or whistle, they proceeded to cross; that as the horse crossed the first rail the train struck him, causing a jar of the wagon which threw the plaintiff upon the ground, causing personal injuries, for the redress of which the action was brought. Upon the trial motions were made to non-suit and to direct a verdict. The grounds were, failure to prove negligence against the company and for contributory negligence. The plaintiff had also offered evidence, before he rested, tending to prove that the view of the approaching train, from where the carriage stood before starting to cross, was cut off by a growth of bushes and trees along the railroad track to within a few feet of the crossing. After the motion to non-suit was denied, the defendant offered witnesses tending to prove that the obstructing bushes and trees had been cut down more than six months before the accident, and also to prove that the required signals were given before reaching the crossing. The motion to non-suit and to direct a verdict were denied by the trial judge, and a writ of error was brought. Held, on review, that the evidence upon the points raised presented questions that were fairly debatable, and that there was no such a failure of proof as to justify the direction of a verdict, and that there was no error in the rulings of the court below. *Ellis v. R. Co.*, 66 N. J. L. 451, 49 A. 437.

(h) *Judgment a non-suit, instead of a "discontinuance."*

Where the legal effect of the judgment is not changed thereby, it is harmless that it is in form a non-suit instead of a discontinuance, as it should have been. *Phillips v. Jordan*, 3 Stew. (Ala. Sup.) 38; *Hart v. Henderson*, 66 Ga. 568.

Sec. 232. Verdict.

(a) *Directing verdict for defendant on opening statement of plaintiff's counsel.*

Where the opening statement of plaintiff's counsel disclosed plaintiff's case as fully as it would have been disclosed had the witnesses testified, and no cause of action could have been established by the testimony, the action of the court in directing a verdict for defendant on the opening statement, was not prejudicial. *May v. Wilson* (Mich. Sup.), 128 N. W. 1084, 17 D. L. N. 1023.

(c) *Lack of essential averments in declaration cured by verdict.*

The lack of essential averments in a declaration, in indebitatus assumpsit, is cured by a verdict, if the evidence was sufficient to support the verdict, and no objection was made to the variance between allegations and proof. *Bank v. Anglo-American Land Mortgage Co.* (N. H.) 189 U. S. 221, 47 L. ed. 782.

(d) *Defective statement of cause of action cured by verdict.*

A defective statement of a good cause of action is cured by the verdict. *Renner v. Bank* (D. C.), 9 Wheaton (U. S. Sup.) 581; *Lincoln Tp. v. Cambron Iron Co.*, 103 U. S. 412.

- (e) *Verdict upon two causes of action, failure of jury to put in such form as to advise the court of findings on the separate causes will not set aside the verdict.*

There being no two causes of action set out in the petition and issues being joined on each, a verdict in such form as not to advise the court of the findings on the separate causes, though irregular, will not be set aside, when the meaning of the jury is clear, when read in connection with the pleadings. *Insurance Co. v. Whittaker*, 29 O. C. C. R. 362.

- (f) *Verdict on one count, others treated as surplusage.*

Where, on an appeal from the decision of commissioners disallowing a claim against the estate of a deceased person, declaration is filed in the circuit court on such claim, but containing also a count on an account stated with the administrators as such; such account may be treated as surplusage, and judgment against the claimant will not be reversed because the jury failed to pass upon the issue made on such count. *Fish v. Morse*, 8 Mich. 34; *Ingram v. Turner*, 21 Ky. L. R. 283, 51 S. W. 148; *Lindsey v. Nagel*, 157 Mo. App. 128, 137 S. W. 912; *Illingworth v. Greenleaf*, 11 Minn. 235 (Gil. 154).

- (g) *On verdict for defendant, plaintiff could not urge that it did not dispose of special pleas.*

In *assumpsit* defendants pleaded the general issue and special pleas. No replication to the special pleas was filed, and there was a verdict for defendant, after a trial, on the merits. Held, plaintiff could not urge that the verdict did not dispose of the special pleas. *Dade v. Buchanan's Adm'r*, *Miner* (Ala. Sup.) 415.

- (h) *Insufficient answer cured when case correctly decided by jury.*

When an issue attempted to be made by the pleadings has

been tried and correctly submitted, and has been determined by the jury, the judgment will not be reversed because the answer was insufficient to properly raise such issues. *Bank v. Gatewood*, 19 Ky. L. R. 225, 39 S. W. 509.

(i) *Special verdict on same facts rendered sustaining demurrer to plea in abatement harmless error.*

A special verdict and judgment on the same facts on which a plea in abatement was based rendered a sustaining of a demurrer to the plea harmless error. *Jenkins v. Fisher*, 15 Ind. App. 58, 42 N. E. 954.

(j) *Special finding or verdict renders errors in overruling demurrers immaterial.*

Where there is a special finding or a special verdict, error in overruling a demurrer is immaterial. *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Eisman v. Whalen*, 39 Ind. App. 350, 72 N. E. 514, 1072.

(k) *Refusal to direct verdict as to one count when plaintiff directs all his evidence to prove another.*

A refusal to direct a verdict for the defendant as to a count, as to which there is a failure of proof, is not ground of error, where the plaintiff makes no effort to prove a case alleged in that count, but directs all his evidence to the proof of another. *R. Co. v. Brown*, 53 Ill. App. 227.

(l) *Verdict against the plaintiff will not be set aside on account of the presence in the record of bad pleas, though sustained on demurrer, no evidence under them being received.*

However bad the defendant's pleas may be, if it does not appear that he gave any evidence under them at the trial, a verdict against the plaintiff will not be set aside on account of the presence in the record of the bad pleas, even though they were sustained on demurrer. *Pollak v. Hutchinson*, 21 Fla. 128.

- (m) *Where, in action to recover land, persons whose possessions are separate are joined as defendants, and no damages are claimed, no injury can result from a joint verdict.*

Where, in an action to recover land, persons whose possessions are separate are joined as defendants, and no damages are claimed, no injury can result from a joint verdict. *Hicks v. Coleman*, 25 Cal. 122, 88 Am. Dec. 103.

- (n) *One paragraph only, when others unobjected to, insufficient to reverse a judgment and set aside the verdict.*

Where the verdict for plaintiff was based on two of the three paragraphs of the complaint, errors assigned under issues presented by the third, on which there was a finding for defendant, will not be considered. *Tucker v. Roach*, 139 Ind. 275, 38 N. E. 822.

- (o) *Verdict on counterclaim for two defendants, when it should be for one only, not prejudicial to plaintiff.*

A statement by the court of issues leading the jury to return a verdict on a counterclaim for both defendants, when it should be in favor of one only, is not prejudicial to plaintiff. *Bank v. Rowley*, 100 Iowa 636, 69 N. W. 1017.

- (p) *Special verdict cures errors on rulings.*

Assignments of error on rulings as to pleadings need not be considered, where the questions urged arise on a special verdict. *Forgy v. Harvey*, 151 Ind. 507, 51 N. E. 1066; *Alberts v. Baker*, 21 Ind. App. 373, 52 N. E. 469; 59 Ga. 84.

- (q) *Correct verdict of jury cures denial of equity trial.*

Where, in an action for misrepresentation and fraud in the sale of land, tried by a jury, it appears that the jury reached a correct conclusion under the evidence, the refusal of the court to try it as an equity case was harmless error, even

if appellant was entitled to have it so tried. *Baker v. Bicknell*, 14 Wash. 29, 44 P. 107.

(r) *Where directed verdict was the only possible outcome of the case, error in impaneling jury immaterial.*

Where the verdict directed by the court was the only outcome of the case legally possible, any error in impaneling the jury was immaterial. *Smith v. Peacock*, 114 Ga. 691, 40 S. E. 757, 88 Am. St. Rep. 53.

(s) *Improper evidence harmless, where party entitled to verdict regardless thereof.*

Where all the facts in the case are before the reviewing court, and show that the party in whose favor judgment was rendered is entitled to recover, the judgment will not be reversed because of the admission of improper evidence. *Holmes v. Goldsmith* (Ore.), 147 U. S. 150, 37 L. ed. 118; *Marcy v. Kinney*, 9 Conn. 393; *Akers v. Kirke*, 91 Ga. 590, 18 S. E. 366; *Taylor v. Felps*, 10 La. Rep. 116; *Gerst v. Jones*, 32 Grat. (Va.) 518, 34 Am. Rep. 773; *Payne v. Grant*, 81 Va. 164; *Ball v. Stewart*, 41 W. Va. 654, 24 S. E. 632; *Ball v. Kearns*, 41 W. Va. 657, 24 S. E. 633; *Knapp v. Rurales*, 37 Wis. 135.

(t) *Where defendant entitled to verdict, in any event, exclusion of evidence offered by plaintiff was harmless.*

Where defendants would be entitled to an affirmative charge, if all the evidence offered by plaintiff and excluded had been admitted, error, if any, in excluding it is harmless. *Crosby v. Pridgin*, 76 Ala. 385; *Nease v. Caprepart*, 16 W. Va. 299; *Gready v. Ready*, 40 Wis. 478. So where plaintiff entitled to verdict, erroneous evidence not prejudicial to defendant, *Groot v. R. Co.*, 34 Utah, 152, 96 P. 1019; *Bagley v. Mason*, 69 Vt. 175, 37 A. 287; *Nye v. Daniels*, 75 Vt. 81, 53 A. 150.

(u) *Verdict for plaintiff cured exclusion of evidence.*

In an action for labor, where defendant claimed that certain wood had been received by plaintiff in payment for the labor, the exclusion of evidence that plaintiff knew that the wood belonged to a third person, as tending to show that he did not take the wood in payment was cured by a verdict for plaintiff on the issue. *Good v. Knox*, 64 Vt. 97, 23 A. 520.

(v) *Verdict for plaintiff affirmed against defense denying knowledge of insanity.*

Where, in an action for money had and received from plaintiff's intestate, the complaint averred that the intestate was insane, and one paragraph of the answer admitted the receipt of the money, for purposes to which defendant alleged he had applied it, and denied knowledge of the insanity, and there was a verdict for plaintiff, and a special finding that the intestate was sane, the sustaining of the demurrer was harmless, as the verdict could be sustained only on the theory of the intestate's insanity. *Price v. Boyce*, 10 Ind. App. 145, 36 N. E. 766.

(w) *Mere possibility that an error in admitting testimony influenced the amount of the verdict will not require a reversal.*

The mere possibility that an error in admitting evidence influenced the amount of the verdict will not require a reversal. *W. U. Tel. Co. v. Kanause* (Tex. Civ. App.), 143 S. W. 189.

(x) *Error in admitting evidence that had no effect upon the verdict.*

Error in the admission of evidence, which is shown by the determination of the action to have had no effect thereon, is harmless. *Reed v. Stapp*, 52 F. 641, 3 C. C. A. 244;

Cahill v. Murphy, 94 Cal. 29, 30 P. 195; Churchill v. Corker, 25 Ga. 479; Whitney v. Bownewell, 71 Iowa 251, 32 N. W. 285; Lazarre v. Peytavin, 12 Mart. (O. S. La.) 684; Mason v. Patrick, 100 Mich. 577, 59 N. W. 239; Lemke v. Daegling, 52 Wis. 498, 9 N. W. 399.

(y) *Striking out evidence where court correctly directs verdict.*

It is not material error to strike out evidence, if the court afterwards correctly directs a verdict. Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296, 3 N. W. 904.

(z) *Where verdict arises from plaintiff's failure to prove, incompetent evidence for defendant is harmless.*

Where the plaintiff fails to introduce any evidence tending to prove his cause of action, and the defendant introduces incompetent evidence over the objection of plaintiff, the introduction of such evidence is not ground for reversing the judgment, because the judgment is properly found upon the failure of proof, unaided by the incompetent evidence. State v. Japan Co., 66 O. S. 183.

(a-1) *Verdict for more cures error in admission of evidence of a less sum.*

An error in the admission of evidence of the admission of a certain sum due, is cured where the verdict is for more than the sum admitted. Getzelman v. Shuman, 22 Ill. App. 167.

(b-1) *Verdict for slaves after abolition, failing to ascertain the value not ground for reversal.*

In an action to recover slaves under Code, p. 552, a verdict rendered in October, 1866, after the abolition of slavery, which failed to ascertain the separate value of the several slaves, was not ground for a reversal of the judgment. Rose v. Pearson, 41 Ala. 687.

(c-1) *Verdict against evidence and instructions not ground for reversal, where both relate to issues not made by pleadings.*

The fact that the verdict is against the evidence and instructions is not ground for reversal, where the evidence and instructions related altogether to an issue not made by the pleadings. *Scott v. Morse*, 54 Iowa 732, 6 N. W. 68, 7 N. W. 15.

(d-1) *Error in directing verdict on untenable ground was not prejudicial.*

Where the defeated party has introduced at the trial all the legal evidence he can offer, and has estopped himself from denying that he can add no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor, and if the bill of exceptions contains all the evidence, and it is clear that it would not sustain a verdict in his favor, an instruction by the court to return a verdict against him on some other, but untenable ground, is error without prejudice. *Bank v. W. U. Tel. Co.* (Iowa), 141 F. 522, 72 C. C. A. 580, 4 L. R. A. n. s. 181.

(e-1) *If there is any evidence to sustain the judgment it will not be disturbed.*

Even though, in the opinion of the appellate court the evidence to the contrary preponderates, the verdict will not be disturbed. *Burden v. Cropp*, 7 Wash. 178, 34 P. 834; *Derclos v. Batcheller*, 17 Wash. 389, 49 P. 483.

(f-1) *Error in directing verdict for not less than specified amount was harmless.*

Any error in directing a verdict for not less than a specified amount was harmless, where the trial court would have been warranted in setting aside a verdict for a smaller amount. *Manufacturers Automatic Sprinkler Co. v. Galbraith* (Ill.), 196 F. 472, 116 C. C. A. 246.

(g-1) Error in directing a verdict contrary to practice.

While directing a verdict is not in accordance with the practice in Virginia, yet, where it appears that no other verdict could have been properly rendered, the error in directing a verdict was harmless, and the judgment will not be reversed on that account. *Hargrave's Adm'r v. Shaw Land & Timber Co.* (Va. Sup.), 68 S. E. 278.

(h-1) Denial to both parties of directed verdict cured by correct one by jury.

The action of the trial judge in denying the request of both parties for the direction of a verdict, and submitting the case to the jury, of his own motion, is not prejudicial, where the jury decides the case as the court ought to have decided it upon the undisputed facts, and exceptions to the refusals of the court to charge as requested are immaterial, where there are no material questions of fact involved in the controversy. *Bank v. Bank*, 172 N. Y. 102, aff'm'g, 54 App. Div. 342, 100 St. Rep. 662, 66 N. Y. Supp. 662.

(i-1) Verdict or finding cured improper evidence.

Where a question of fact, to which testimony excepted to relates, has been decided wholly independently of said testimony, and the finding conclusively determines the rights of the parties, it is immaterial whether the testimony was competent or not. *Secor v. Law*, 3 Keyes 525, aff'd, 22 Super-Ct. (9 Bosw.) 163, 4 Abb. Ct. App. Dec. (N. Y.) 188, *Rogers v. Wheeler*, 6 Lans. 420, aff'd, 52 N. Y. 262.

(j-1) Verdict of jury which evidently disregarded plaintiff's value of his services.

Where, in an action for services in assisting in the sale of certain railroad stocks, the jury allowed plaintiff only the amount which defendant had twice offered to pay, it was apparent the plaintiff's testimony as to the value of his serv-

ices had been disregarded, errors in the admission of such testimony were harmless to the defendant. *Gardner v. Eldridge*, 149 Mo. App. 210, 130 S. W. 403.

(k-1) *General verdict cured erroneous evidence on defective count.*

Where a petition in an action contains two counts, one of which is insufficient, error in admitting evidence relating to the defective count is not prejudicial, where there is a general finding for plaintiff. *St. Louis Rawhide Co. v. Hill*, 72 Mo. App. 142.

(l-1) *Propriety of evidence unimportant, where remainder sufficient to support verdict.*

The propriety of admitting certain evidence is unimportant on appeal, where the remainder is sufficient to justify the verdict. *Daly v. Falk Co.* (Mo. App.), 82 S. W. 1114.

(m-1) *A just verdict overrides errors in admission or rejection of evidence.*

A just verdict cured trivial errors in the admission or rejection of evidence. *Miller v. Newman*, 41 Mo. 509; *Van de Veld v. Judy*, 143 Mo. 348, 48 S. W. 1117, *affm'd*, 45 S. W. 1128.

(n-1) *Verdict justified by the evidence affirmed.*

Where an issue was fairly submitted to and passed on by the jury, the result ought not to be disturbed, though the manner of reasoning used was irregular, and this is especially so where it is clear that the evidence introduced, pro and con, fully justified the verdict. *Woody v. R. Co.*, 104 Mo. App. 678, 78 S. W. 658.

(o-1) *Where verdict is not based on the improper testimony admitted.*

Where it is apparent that the verdict of the jury was not

based on testimony which was improperly admitted, but the finding was in accordance with other testimony which denied the correctness of the improper testimony, there is no ground for reversal. Carthage Marble & White Lime Co. v. Bauman, 55 Mo. App. 204.

(p-1) *Incompetent evidence immaterial, where verdict is clearly supported by the evidence.*

Where the verdict is responsive to the issues submitted, and is supported by a preponderance of the testimony, and the damages assessed indicate that the jury were not influenced by the admission of incompetent evidence, the admission of such evidence is harmless. Burkholder v. Henderson, 78 Mo. App. 287.

(q-1) *Where evidence is doubtful verdict upheld.*

Where the matter in contest is left doubtful by the evidence, and the question is one of fact, the verdict of the jury will not be disturbed. Banks v. Botts, 10 La. Rep. 45.

(r-1) *Verdict upheld unless clearly contrary to the evidence.*

The verdict of a jury on a question of fact, unless clearly contrary to the evidence, will not be disturbed. Orleans Nav. Co. v. Allard, 6 La. Rep. 493.

(s-1) *Where verdict depends on credibility of witness it will not be disturbed.*

The supreme court will not disturb the verdict of a jury where the cause depends on the credit due to a witness. Morris v. Hatch, 2 Martin's Rep. n. s. (La.) 491.

(t-1) *Erroneous evidence of value contradicting written contract cured by verdict.*

Where the trial court erroneously receives testimony which contradicts or varies the terms of a written contract as to the price of certain goods, and the jury, in answers to special

questions, state that they allow the plaintiff nothing on account of such goods, the error is immaterial. *McGrath v. Crouse*, 6 Kan. App. 507, 50 P. 969.

(u-1) *Verdict upheld, though sustained wholly by circumstantial evidence.*

The question as to the sufficiency of evidence which is wholly circumstantial, as opposed to positive testimony, is for the determination of the trial court or jury, and their finding will not be disturbed upon appeal. *Cox v. R. Co.*, 77 Iowa 478.

(v-1) *Where there is some evidence to support the verdict it will not be set aside as excessive.*

Where, under the instructions, to which no exception was taken by appellant, there was some evidence to support the verdict as to the amount of damages, the verdict will not be set aside as excessive. *Minthon v. Lewis*, 78 Iowa 620.

(w-1) *Immaterial evidence admitted did not affect the verdict.*

Where evidence is introduced on a preliminary question, which is addressed to the court, error in the admission of such evidence will not be material, it appearing that there was sufficient evidence on which the action of the court might have been based. *Spaulding v. R. Co.*, 98 Iowa 205.

(x-1) *Improper evidence not influencing the verdict.*

Where the complaint, in an action to recover for services rendered, contains two counts, the first being on a special contract, and the second on a quantum meruit, and the verdict is on the first count only, evidence under the second count as to what is the customary price for the kind of services alleged to have been performed, even if improperly admitted, will not work a reversal, since it could not have influenced the verdict. *Barrett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927.

(y-1) *Preponderance of the evidence against the verdict insufficient to justify reversal.*

Where the verdict finds support in the evidence, the supreme court will not reverse the action of the court below in refusing to grant a new trial, although it believes that the preponderance of evidence is the other way. *Johnson v. R. Co.*, 58 Iowa 348; *Walthelm v. Artz*, 70 Iowa 609; *Rissu v. Rathburn*, 71 Iowa 113; *Pence v. R. Co.*, 79 Iowa 389; *Acree v. Brayton*, 75 Iowa 719; *Harher v. Spafford*, 46 Iowa 11; *Cole v. Caskery*, 63 Iowa 526; *McMurray v. Bassett*, 18 Fla. 609; *Gains v. Forcheimer*, 9 Fla. 265.

(z-1) *Verdict of the jury on conflicting evidence affirmed.*

When witnesses, both fair and anxious to tell the truth, contradict each other materially, and the jury who saw the witnesses before them, gives the weight of the testimony to one of them and renders a verdict accordingly, such verdict will not be set aside on error by the appellate court. *R. Co. v. Suhwiar*, 20 O. C. C. 558, 10 O. C. D. 715; *Coker v. Merritt's Ex'r*, 16 Fla. 416; *Mickel v. Mooring*, 16 Fla. 76; *Rowe v. Morgan*, 71 Ill. App. 567; *Scott v. Morse*, 54 Iowa 732; *Ackley v. Berkey*, 22 Iowa 226.

(a-2) *Instructions conflicting, but verdict correct.*

If instructions are conflicting, the verdict will not be set aside if in harmony with a correct instruction. *Cobb v. R. Co.*, 38 Iowa 601.

(b-2) *Verdict on charge requiring that evidence must be clear, satisfactory and conclusive, not set aside on the ground that the evidence was conflicting.*

Where the court instructed the jury that to warrant a verdict on a particular issue in behalf of one of the parties, the evidence must be clear, satisfactory and conclusive in his favor, and a verdict was rendered for such party on such evidence; held, that the supreme court would not, on appeal,

set aside such verdict, on the ground that the evidence was conflicting, if it appear that the jury might, without bias or prejudice, have concluded that in their minds the evidence was of such a character. *Hoadley v. Hammond*, 63 Iowa 599.

(c-2) *Slight evidence sufficient to support a verdict.*

A reviewing court will not say a verdict is contrary to the evidence, where there is no contradiction of the question in issue, though the evidence containing the proposition is so slight and uncertain that it is a mere straw on which to hang a verdict. *Gates v. Baking Co.*, 22 O. C. C. 724, 11 O. C. D. 721.

(d-2) *Verdict of jury rendered erroneous evidence harmless.*

In an action against a carrier to recover for its delay in furnishing a shipper with cars, it was harmless error to have admitted evidence as to the value at given dates of such goods at the place of shipment, where a special verdict of the jury shows that they based their finding or damages upon prices at the point of destination. *R. Co. v. Walcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

(e-2) *Verdict as to handwriting, based on the evidence of two witnesses, will not be disturbed.*

A finding that certain signatures are genuine will not be disturbed, where it is based on the evidence of two witnesses, one qualified as an expert, and the other familiar with the handwriting, and there is nothing opposed but the bare denial of the person whose signature it purports to be. *Greenebaum v. Bernhofen*, 167 Ill. 640.

(f-2) *If evidence on either side uncontradicted justified a verdict for either party, court will not disturb, though it does not commend the verdict.*

When the evidence on either side would, if uncontradicted,

justify a finding for either party, the court will not disturb, although the verdict does not commend itself to the court *Wilcoxon v. Wilcoxon*, 165 Ill. 454.

(g-2) *Where two trials have resulted alike, court will not reverse because the number of witnesses is against the verdict.*

Where there have been two trials, with the same result, and a new trial has been refused, the court will not reverse upon the ground that the finding is against the evidence, because the preponderance in number of witnesses is against the finding. *Love v. Bowdle*, 44 Ill. App. 602; *Bernstein v. Roth*, 44 Ill. App. 226; *Osborn v. Miner*, 46 Ill. App. 133.

(h-2) *A verdict for defendant directed by the court on claim based on a thirty-year old paper will not be disturbed.*

Where the foundation of an action was a certain paper writing purporting to be more than thirty years old, and the execution of which was denied in the defendant's answer, and where the only evidence on behalf of the plaintiff was proof of presentation to and rejection by the defendant, and a paper in form following: "Received of H., Esq., on the 7th day of August, A. D. 1873, Three thousand dollars, to be returned, with interest, from that date, at the rate of twelve percent per annum, out of the first receipts from the sale of land bought by us from Messrs. C. P. and others, in Athens county, Ohio, after we are reimbursed for advances for its payment, \$3,000.00 (signed), B. & W." together with a statement from the books of B. that B. & W. had on August 1, 1873, procured of H. three thousand dollars and paid the same on the purchase price of land purchased from C., and where the only evidence on behalf of the defendant was an endorsement on the back of said paper, in the following form: "One thousand dollars of the within three thousand dollars I am to James L. Birkley for that sum

belonging to him. September 5, 1873 (signed), H." and also the testimony of witnesses that the said paper writing was not in the handwriting of B., a direction to the jury by the court to return a verdict for the defendant was not erroneous. *Wright v. Hull*, 83 O. S. 385.

(i-2) *General verdict for defendant sustained if evidence sustains any defense.*

A general verdict for defendant will not be set aside on review, if there is sufficient evidence to sustain any one of the numerous defenses offered. All the defenses need not be sustained by evidence in order to sustain a general verdict. *Jarmush v. Iron Co.*, 3 O. C. C. n. s. 1, 13 O. C. D. 122.

(j-2) *Where evidence is excluded on objection, objector can not object to a verdict because of the absence of such evidence.*

Where evidence on a given point is excluded upon the objection of a party, he can not afterward object to a verdict caused by the absence of such evidence. *Clark v. Boltz*, 10 O. C. C. n. s. 1, 19 O. C. D. 665.

(k-2) *A verdict conforming with appellant's instructions must stand.*

A verdict in conformity to appellant's instructions must stand. *Bozeman v. Shaw*, 37 Ark. 160.

(l-2) *Verdict founded on statement of hostile witness upheld, although three witnesses testified to the contrary.*

Where the jury returned a verdict against the plaintiff, manifestly based upon an additional statement made by an unexpectedly hostile witness called by the plaintiff, a reviewing court will not grant a reversal, notwithstanding three other witnesses testified to the contrary. *Katafiasz v. Electric Co.*, 1 O. C. C. n. s. 129, 14 O. C. D. 127.

(m-2) *Where evidence is contradictory, the question of credibility being for the jury, verdict not set aside as against the weight of the evidence.*

Where the evidence is contradictory, making it the duty of the jury to decide upon the credibility of the witnesses, the court will not set aside a verdict as against the weight of the evidence. *R. Co. v. Nash*, 12 Fla. 497.

(n-2) *A directed verdict for plaintiff before defendant rested his case not reversible where, had his evidence been received it could have availed nothing.*

The fact that the trial court directed a verdict for plaintiff before defendant had rested his case, is not reversible error, where the evidence offered, if received, could not have cured the defects in the defendant's proof. *Davis v. Holbrook*, 24 Col. 493, 55 P. 730.

(o-2) *Uncertainty in a verdict as to the interest on a note, in respect to which there is no defense, is immaterial.*

Uncertainty in a verdict as to the matter of interest on a note, in respect to which there was no defense, is immaterial. *Myers v. Parsons*, 129 Cal. 653, 62 P. 216.

(p-2) *Error as to damages immaterial, where verdict is for defendant.*

The exclusion of evidence bearing only on the element of damages is not ground of error, where the verdict is for the defendant. *Burnett v. Luttrell*, 52 Ill. App. 19.

(q-2) *Verdict in equity sustained by the evidence, notwithstanding wrong instructions to the advisory jury.*

Where the verdict is merely advisory, as in equity, erroneous instructions are no ground for reversal, if the finding is sustained by the evidence. *Shea v. Murphy*, 164 Ill. 614.

(r-2) *A second verdict will not be set aside on the ground that it is excessive.*

A court will not incline to set aside a verdict on the ground that it is excessive, where it is a second verdict, and the trial court, having heard the evidence, has permitted the verdict to stand, without a remittitur of what the court regarded as excessive. *R. Co. v. Rice*, 46 Ill. App. 60.

(s-2) *Where the verdict is manifestly right, court will not inquire into misconduct of counsel in his concluding argument.*

Where the judgment is manifestly for the right party, the appellate court will not inquire into the misconduct of counsel in his concluding remarks to the jury. *Sackewitz v. American Biscuit Mfg. Co.*, 78 Mo. App. 144.

(t-2) *Verdict will be vacated only in a clear case for gross misstatements by counsel.*

It is only in a very clear case, the misstatements of the facts by counsel to the jury, which can not be corrected, that the court will vacate the verdict. *Varty v. Messmore*, 132 Mich. 314, 93 N. W. 611, 9 D. L. N. 616.

(u-2) *Where verdict covered all issues of fact, refusal to submit other questions in special verdict will not be considered.*

Where the verdict covered all the issues of fact, the question of the refusal to submit other questions in the special verdict will not be considered. *Herndt v. City of Cudahy*, 141 Wis. 457, 124 N. W. 511.

(v-2) *Jury returning single verdict, when directed on certain finding to return two, was harmless error.*

Instruction that, on certain finding, the jury might award exemplary damages, and if so, they should return two verdicts, one for compensatory and one for exemplary dam-

ages, even if erroneous, was harmless, where the jury returned but a single verdict. (Pa.) Traction Co. v. Kordiyak, 171 F. 315, 96 C. C. A. 207.

(w-2) *Verdict cured improper instructions as to valuation in action on insurance policy.*

Where the pleadings, in an action on an insurance policy, are such as not to allow the jury to find that the value of the property, etc., was greater than that fixed by appraisers, defendant can not complain because the court went outside of the issues, by charging that if the appraisements did not show the value of the property, the jury might ascertain its value from the evidence, the jury, in effect, upholding the appraisalment. Insurance Co. v. Stoors (Colo.), 71 F. 120, 17 C. C. A. 645.

(x-2) *Where two propositions are the subject of a special verdict, and jury directed to find as to one, the duplicity was harmless.*

Where two propositions of fact are embodied in the disjunctive in a question of a special verdict, and there is no evidence as to one, and the jury are instructed to answer only as they shall find respecting the other, the duplicity is harmless. Howard v. Beldenville Lumber Co. (Wis. Sup.), 114 N. W. 1114.

(y-2) *Undisputed evidence supporting verdict, erroneous instructions harmless.*

Where, on the undisputed evidence and conceded facts, plaintiff is entitled to recover, a judgment in her favor will not be reversed on appeal for error in instructions. Rhodus v. R. Co., 156 Mo. App. 281, 137 S. W. 907.

(z-2) *When facts are undisputed and the case is one of law, the court should direct the jury what verdict to find.*

When the facts are undisputed, and the case is to be de-

cided on mere questions of law, it is not error for the court to direct the jury what verdict to find. *American Dock, etc., Co. v. Trustees*, 39 N. J. Eq. 409.

(a-3) *Instruction stating the amount verdict might be rendered for did not mislead the jury.*

A judgment should not be set aside for an error in stating in a charge the amount the verdict might be rendered for, where it did not mislead the jury and they did not act on it. *Abby v. Mace*, 46 State Rep. 764, 19 N. Y. Supp. 375, affm'd, 111 N. Y. 574, 57 St. Rep. 867.

(b-3) *Refusal to give abstractly correct instruction where the basis is negated by the verdict.*

A judgment will not be reversed for refusal to give an instruction abstractly correct, where the basis was negated by the verdict. *Snell v. Crowe*, 3 Utah 26, 5 P. 522.

(c-3) *Exception to portion of charge, which was a mere corollary to previous portion which fully warranted the verdict.*

Where one portion of a charge to the jury, to which exception is taken, is a mere inevitable corollary to a previous portion which fully warranted the verdict, and as to which no exception was taken, or error assigned, and it appears in the light of the pleadings that no harm resulted therefrom to the defeated party, the exception is unavailing. *German Mut. Ben. Ass'n v. Peters (Mo.)*, 83 F. 60, 27 C. C. A. 435.

(d-3) *Error in charging in relation to quotient verdict not available on appeal.*

In the absence of proof that a quotient verdict had been returned by the jury, error of the court in charging that though it was improper and illegal for them to agree to arrive at a verdict in that manner; yet, if they did not so

agree, but assented and voluntarily agreed on such amount, without reference to the manner in which it was obtained, the verdict was not contrary to law, and was not available on appeal. *Kolb v. St. L. Transit Co.*, 102 Mo. App. 143, 76 S. W. 1050.

(e-3) *Erroneous instruction having no bearing on the verdict.*

Error can not be assigned upon an instruction to the jury which had no possible bearing on the verdict. *Johnston v. Davis*, 60 Mich. 56, 26 N. W. 830.

(f-3) *Verdict right on the merits, errors in instructions immaterial.*

Where the verdict is right on the merits, the judgment will not be reversed on account of errors in the instructions. *Henderson Bridge Co. v. McGrath* (Ind.), 134 U. S. 260, 33 L. ed. 934; *Bank v. Bank*, 88 U. S. (21 Wall.) 294, 22 L. ed. 560; *R. Co. v. Jackson* (Ark. Sup.), 132 S. W. 206; *Terry v. Sickles*, 13 Cal. 427; *Graven v. Doyman*, 5 Cal. 542; *Winans v. Sierra Lumber Co.*, 66 Cal. 161, 4 P. 592; *Detemple v. Mitchell*, 15 Col. App. 127, 61 P. 434; *Allsop v. Magill*, 4 Day (Conn.) 42; 86 Ga. 167; 59 Ga. 454; 62 Ga. 11; 82 Ga. 723; *Wylly v. King*, Ga. Dec., Dec. 7, 1854; *Myrick v. Hicks*, 15 Ga. 155; *Walker v. Bernstein*, 43 Ill. App. 568; *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336; *R. Co. v. Gould*, 18 Ind. App. 275, 47 N. E. 941; *Roller v. Kling*, 150 Ind. 159, 49 N. E. 948; *Huber v. Beck*, 6 Ind. App. 484, 33 N. E. 985; *Chiles v. Jones*, 37 K. (7 Dana) 540; *R. Co. v. Canbron*, 10 Ky. L. R. (abst.) 544; *Hewes v. Barron*, 7 Mart. n. s. (La.) 134; *Besley v. Insurance Co.*, 3 Gill & J. (Md.) 450, 22 Am. Dec. 337; *Rowley v. Ray*, 139 Mass. 241, 29 N. E. 663; *Clark v. Moore*, 3 Mich. 55; *Gutta Percha & Rubber Mfg. Co. v. Wood*, 84 Mich. 452, 48 N. W. 28; *Durfee v. Newkirk*, 83 Mich. 522, 47 N. W. 351; *Kelenbach v. R. Co.*, 87 Mich. 509, 49 N. W. 1082;

Kelly v. Hendrie, 26 Mich. 255; Moerman v. Clark-Rutkes-Weaver Co., 145 Mich. 540, 108 N. W. 988, 13 D. L. N. 648; Colter v. Mann, 18 Minn. 96 (Gil. 79); Cartwright v. Carpenter, 8 Miss. (7 How.) 328, 40 Am. Dec. 66; Pratte v. Judge of Court of C. P., 12 Mo. 194; Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844; Janvron v. Fogg, 49 N. H. 340; Alston v. Jones, 17 Barb. (N. Y.) 276; Clover v. Insurance Co., 101 N. Y. 277; Thompson v. Jones, 13 O. C. C. n. s. 493, 23 O. C. D. 182; W. Grimes Dry Goods Co. v. Malcolm (Okl.), 58 F. 670, 7 C. C. A. 426, aff'd, 164 U. S. 483; Erie City Iron Works v. Barber, 106 Pa. 125; Bolan v. Peebles, 1 Brev. (S. C.) 109; Pearson v. Burditt, 26 Tex. 157, 80 Am. Dec. 649; Seeley v. R. Co., 2 Williams's Civ. Cas. Ct. App., sec. 88 (Texas); Meriwether v. Dixon, 28 Tex. 15; Abbey v. Shiner, 5 Tex. Civ. App. 287; Gilbertson v. Miller Min. & Smelting Co., 4 Utah 46; Ross v. Bank, 1 Aiken (Vt.) 43, 15 Am. Dec. 664; Burnham v. Jenness, 54 Vt. 272; R. Co. v. Medley, 75 Va. 499, 40 Am. Rep. 734; Carroll v. Centralia Water Co., 5 Wash. 613, 32 P. 609, 33 P. 431; Kellogg v. Cook, 18 Wash. 516, 52 P. 233; Keese v. Bank, 77 Va. 129; Boggess v. Taylor, 47 W. Va. 254, 34 S. E. 739; Jones v. Parish, 1 Pin. (Wis.) 494.

(g-3) *Error in instruction cured by verdict.*

In an action on a life insurance policy error in an instruction making the liability of the company to depend on the truth of every statement made by the assured, and was enumerated in the instruction, whether or not the risk was thereby increased, was cured by a special finding of the jury made under the instructions of the court, that assured at the time of the making of the application was not in good health. Galbraith's Adm'r v. Ins. Co., 75 Ky. (12 Bush) 120; Clark v. McGraw, 14 Mich. 139; Finan v. Babcock, 58 Mich. 301, 25 N. W. 294; Pearl v. Benton Tp., 136 Mich. 697, 100 N. W. 188, 11 D. L. N. 161.

(h-3) *Error in submitting issue as to electric wire cured by verdict.*

Where a complaint counts on negligence in maintaining a dead wire, and the court submits the question of negligence in maintaining the wire, if it was a live one, and the jury finds that it was a dead wire, the error in submitting such issue is without prejudice. *Swanson v. Meniminee Electric Light Co.*, 113 Mich. 603, 71 N. W. 1098, 4 D. L. N. 405.

(i-3) *Improper question as to verdict at a previous trial cured by instruction to disregard it.*

Where plaintiff asks a witness if he did not state that he had heard that plaintiff had received a verdict of \$2,500 at a former trial, and defendant's counsel immediately states that such was not the verdict, and the court directs the jury that it should not consider the question as showing the amount of the former verdict, the question is not prejudicial error. *Leach v. Detroit Electric Ry.*, 129 Mich. 286, 88 N. W. 635, 8 D. L. N. 951.

(k-3) *Erroneous instruction as to exemplary damages cured by moderate verdict.*

Since under an allegation that an execution was issued on a judgment that had been paid, and levied on plaintiff's goods when he was not entitled to take, and that it was done maliciously and oppressively, plaintiff is entitled to exemplary damages, if true, an instruction that plaintiff claimed, by reason of such levy, his store was closed for three days, and that he was damaged in the sum of \$60 per day, or in the sum of \$160, while the mistake was not prejudicial error, where the plaintiff recovered a verdict for only \$300. *Kendall Boot & Shoe Co. v. Davenport*, 63 Kan. 884, 65 P. 688.

(l-3) *Refusal to charge that claimant was entitled to son's wages until 21 years old cured by verdict.*

When the jury, in an action for the death of plaintiff's

minor son, awarded plaintiff only the value of the son's services to the age of 21, defendant could not complain of a refusal to charge that plaintiff was entitled to the son's services only until that age. *Rouse v. Downs*, 5 Kan. App. 549, 47 P. 982.

(m-3) *Verdict unaffected by erroneous instructions as to damages.*

Where an instruction authorized damages for certain work, and there was no evidence that any damages were claimed therefor, and no proof offered as to such damages, as the verdict could not have been affected by such instructions the error was harmless. *Chicago Bdg. & Mfg. Co. v. Banking Company*, 70 Kan. 344, 78 P. 808.

(n-3) *Erroneous instruction as to assumed risk cured by verdict for defendant.*

In an action for injuries to a servant, where defendant pleads assumed risk and contributory negligence, and the jury finds that plaintiff knew the danger and could have avoided it, and was guilty of contributory negligence, and return a general verdict for defendant, it will not be reversed for any error in instructions relating to assumed risk. *Madison v. Clippinger*, 74 Kan. 700, 88 P. 260.

(o-3) *Error in one instruction, when another supports the verdict.*

Where undisputed evidence under one proposition stated in the instructions would render the verdict of the jury correct, the judgment will not be reversed on account of error as to another proposition of law, even though it does not appear but that the verdict was based on such erroneous proposition. *Newell v. Martin*, 81 Iowa 238.

(p-3) *Verdict under erroneous instructions would have been improper under correct instructions.*

Error in an instruction will be deemed without prejudice,

where a contrary verdict, under correct instructions, would have been clearly against the evidence. *Croddy v. R. Co.*, 91 Iowa 598.

(q-3) *Verdict of fraud not interefered with unless clearly against the evidence.*

Where the question is, as to whether a transaction was fraudulent, the supreme court will not interfere with a verdict of the jury, who had the opportunity to see the witnesses and judge of their credibility, unless the evidence is so against the verdict as to raise a presumption of passion or prejudice on the party of the jury. *Enneking v. Scholtz*, 69 Iowa 473; *Votaw v. Diehl*, 62 Iowa 676.

(r-3) *Verdict on the ground of negligence usually affirmed.*

If a conclusion of negligence can be, by the jury, reasonably drawn from the circumstances, such conclusion will not be interfered with on appeal, although the opposite conclusion appears to the court to be the more reasonable; but if the general result appears to be wrong, and the jury, as appears from their special finding, was unable to assign any certain or tangible ground for their conclusion, the court should interfere. *Ford v. R. Co.*, 69 Iowa 627.

(s-3) *Verdict upheld though, under instructions, plaintiff required to prove another but uncessential fact.*

Where the verdict necessarily implies the finding of every material fact as established which, under the law, is required to establish a right of recovery, there is no ground to set aside a verdict, even though, under the instructions, plaintiff was required to prove in addition, as a condition of his right of recovery, another fact which was not essential *Tuck v. Singer Mfg. Co.*, 67 Iowa 576.

(t-3) *Error in instruction unavailable where it did not influence the verdict.*

Error in instructions is not available, where it appears

from the answers of the jury to the special interrogatories, that such error did not influence the verdict. *R. Co. v. Orr*, 84 Ind. 50; *Nichols v. Central Trust Co.*, 43 Ind. App. 64, 86 N. E. 878.

(u-3) *Special verdict rendered giving of instruction unimportant.*

Where a special verdict ascertains facts which are clearly sufficient to support the judgment, irrespective of other facts, in relation to which an instruction is asked for and refused, the refusal of the instruction is unimportant. *Rice v. Rice*, 6 Ind. 100.

(v-3) *Where jury directed to return a special verdict, harmless error to give general instructions.*

Where the jury was directed to return a special verdict, the giving of general instructions is improper, but harmless error. *Bd. Com. Huntington County v. Bonebrake*, 146 Ind. 311, 45 N. E. 470; *Bank v. Thompson*, 20 Ind. App. 649, 50 N. E. 410.

(w-3) *If jury fail to find a verdict on one of special issues submitted, appellate court will not review alleged erroneous instruction on that issue.*

If special issues are submitted to a jury and they fail to find a verdict upon one of them, the appellate court will not review an alleged erroneous instruction on this issue. *Lorenzane v. Camarillo*, 45 Cal. 125.

(x-3) *Where the verdict is merely advisory error in instruction is not ground for reversal.*

Where a verdict is merely advisory, error in instructions is not ground for a reversal. *Shideler v. Fisher*, 13 Col. App. 106, 57 P. 864; *In re Moore*, 72 Cal. 339, 13 P. 880.

(y-3) *Refusal to submit counterclaim to jury rendered harmless by the verdict.*

In an action for the breach of a building contract abandoned by defendants, on the alleged ground that there was a material variance between the detailed "working plans" and the original plans involving much additional labor, in which defendants counterclaimed for the partial work done by them, though it was error to refuse to submit to the jury the question arising on the counterclaim, the error was harmless, where the verdict established that there was no substantial variance, and that defendants were not justified in abandoning their contract. *Williams v. Boehan*, 60 N. Y. Super. Ct. 319, 17 N. Y. Supp. 484.

(z-3) *Refusal to submit proper question to jury cured by proper verdict.*

A refusal to submit a proper question to the jury for a special finding, or to compel an answer thereto, is harmless error where the answer returned to their questions, together with the undisputed facts of the case below justified such a general verdict as is returned. *City of Wyandotte v. Gibson*, 25 Kan. 236.

(a-4) *Erroneous charge as to expectancy of life which did not influence the verdict.*

Although in an action by a wife against a liquor seller for damages for the death of her husband, the charge may have tended to mislead the jury into determining that the wife was entitled to damages for the loss of her husband's support during the expectancy of her life, without reference to the probabilities of the husband's life continuing as long as she might live, yet, where the verdict in her favor is so small that it is evident that the probabilities of the husband's life must have been considered in fixing the amount, the judgment will not be reversed. *Brockway v. Patterson*, 72 Mich. 122, 40 N. W. 192, 1 L. R. A. 708.

(b-4) *Verdict will not be disturbed when instructions, considered as a whole, are correct.*

Instructions of the court to the jury must all be taken together, and if, when thus viewed, the case appears to have been fairly presented to the jury, the verdict will not be disturbed. *Dwinelle v. Henriquez*, 1 Cal. 387.

(c-4) *Verdict upheld, though refusal to charge was erroneous.*

Plaintiff ordered a monument of defendant to be shipped directly to Ohio and paid for within 30 days after it arrived. On its arrival in Ohio the purchaser refused to receive it, for that it did not meet the requirements of the order. Defendant had taken several orders from plaintiff, some of which it filled and delivered. Thereupon plaintiff refused payment unless it was allowed the amount of the first monument, and defendant refused to fill any further orders unless paid for those it had filled. Plaintiff sought to recover in the first count the price paid for the first monument. In the second count, damages for failure to fill the order for another monument. With respect to the first count the court charged in a manner not excepted to, and the jury returned a verdict for \$494.96. As to the second count, the court charged that if plaintiff declined to pay for the same within thirty days would excuse defendant from filling its order, to which defendant excepted, and the jury returned a verdict for plaintiff. Held, that this verdict might be sustained, even though the refusal to so charge was erroneous, for, on the verdict on the first count it must be presumed that the price of that monument was paid under such circumstances that it was plaintiff's money in the hands of defendant, which plaintiff might apply in payment of whatever was due to it from defendant, which defendant attempted to apply in payment of these orders; and, the contrary not appearing, it will be further presumed that the

amount due on such orders did not exceed the amount so in defendant's hands, and that therefore plaintiff did not owe defendant anything, when it refused to fill the order embraced in the second count. *C. Bowers Granite Co. v. Thomas Farrell & Co.*, 66 Vt. 314, 29 A. 491.

(d-4) *Failure to give proper charge immaterial if verdict be conformable to the law and the evidence.*

If the verdict be conformable to the law and the evidence, it will not be set aside merely because the court refused to give instructions which might properly have been given. *Randall v. Parramore*, 1 Fla. 58.

(e-4) *Verdict for limited damages cured erroneous instructions.*

Where plaintiff, who was fifty years old, was permanently crippled, with one limb one and one-half inches shorter than before the injury, and she suffered great pain, was unable to perform her household duties, and had been compelled to pay a physician's bill of \$100, defendant was not prejudiced by an instruction which erroneously failed to limit the jury's allowance of damages to as much as were shown by the pleading, plaintiff having been allowed a verdict for only \$450. *Town of Sellerberg v. Ford*, 39 Ind. App. 94, 79 N. E. 220.

(f-4) *Correct verdict remedied error in theory of submission to the jury.*

That the court erred in the theory upon which he submitted the case to the jury is harmless, where the jury reached a proper conclusion. *Finan v. Babcock*, 58 Mich. 301, 25 N. W. 294.

(h-4) *In action involving title to land, charge that plaintiff could recover on his possession alone cured by verdict.*

In an action involving an issue as to the party's claim of

title to land by prescription, an exception to a portion of a charge in which the jury were instructed that he could recover on his possession alone, is not available, where the jury, by special verdict, found that he had title by prescription. *Hassom v. J. E. Safford Lumber Co.*, 82 Vt. 444, 74 A. 197.

(i-4) *Refusal of the court to accept sealed verdict of jury not reversible error.*

In ejectment by A against B, the sole question was as to the county in which the disputed land lay, and the evidence all tended to maintain A's contention. The court virtually instructed the jury for A, but, notwithstanding, submitted the case to them. A sealed verdict for B was brought in, which the judge refused to accept, and verdict was entered for A, by direction of the court. This B assigned for error. Judgment affirmed. *Pardee v. Orvis*, 103 Pa. 451.

(j-4) *Erroneous fact submitted to the jury not affecting verdict.*

In action for injury caused by driving into an excavation in the street which was unavoidable, a judgment for plaintiff will not be reversed because of the submission to the jury of the question as to whether a certain kind of light would have been sufficient. *Blakeslee v. City of Geneva*, 61 App. Div. 42, 103 St. Rep. 1122, 69 N. Y. Supp. 1122.

(k-4) *Delay authorized verdict by less than a unanimous jury.*

Delay in instructing the jury until several days after the case was submitted to him, that the verdict might be returned by a less number than the whole jury, to be signed by three-fourths or more of them agreeing, was not prejudicial. *Ashland C. I. & R. Co. v. Wallace's Admr.*, 101 Ky. 626, 19 Ky. L. R. 849, 42 S. W. 744.

(l-4) *Verdict for "plaintiff" and not for "plaintiffs," not reversible error.*

That a verdict is for the "plaintiff," and not for the "plaintiffs," is not ground for reversing a judgment that is in favor of the plaintiffs. *Magill v. Murphy*, 180 Ill. App. 487; *Insurance Co. v. Baldwin*, 48 Ill. App. 203; *McGill v. Rothgeb*, 45 Ill. App. 511.

(m-4) *Reception of verdict by the clerk of the court allowable in some jurisdictions and reversible error in other jurisdictions.*

In civil cases it is the prevailing practice to permit the judge on retiring from the bench, to direct the clerk, with the consent of the parties, to receive a verdict of a jury still deliberating on their verdict, if they should agree during the recess. *Sorrelle v. Craig*, 9 Ala. 534; *Dubue v. Lazell*, 182 N. Y. 482, 75 N. E. 401, rev. 94 N. Y. Supp. 1144, 105 App. Div. 533; *Huston v. Potts*, 65 N. C. 411; *Willoughby v. Treadgill*, 72 N. C. 438; *Bedal v. Spurr*, 33 Minn. 207, 22 N. W. 390; *Burlingame v. Burlingame*, 18 Wis. 285, 16 A. & E. Ann. Cas. (note) 90; *Contra, Britton v. Fox*, 39 Ind. 369; *Willett v. Porter*, 42 Ind. 250; *R. Co. v. Polly*, 14 Gratt. (Va.) 447; *Davis v. Delaware*, 41 N. J. L. 55; *Davis v. Wilson*, 65 Ill. 525, 16 A. & E. Ann. Cas. (note) 91.

(n-4) *Joint verdict, but damages assessed severally.*

A verdict in an action for assault and battery against a number of defendants, which assessed damages severally, if erroneous, was error without prejudice. *Hooks v. Vet.*, 192 F. 314, 113 C. C. A. 526.

(o-4) *Verdict not prejudicial to defendant.*

The fact that a verdict is for less than plaintiff's evidence and for more than defendant's evidence shows to be due is not prejudicial to defendant. *Terrell Coal Co. v. Lacey*

(Ala.), 31 S. 109; Sutcliffe v. Seidenberg, 132 Cal. 63, 64 P. 131; rehearing den. 132 Cal. 63, 64 P. 469; Conner v. Meary, 8 App. D. C. 1; Wahl v. Laubersheimer, 174 Ill. 338, 51 N. E. -860; Greenburg v. Stevens, 114 Ill. App. 483, affm'd, 212 Ill. 606, 72 N. E. 722.

(p-4) *Joint verdict in action for land, where possession distinct and no damages claimed.*

Where, in an action to recover land, persons whose possessions are separate are joined as defendants, and no damages are claimed in the action, no injury could result from the joint verdict. Hicks v. Voleman, 25 Cal. 222, 85 Am. Dec. 103.

(q-4) *Verdict for \$1,000, where plaintiff entitled to \$1,500 or nothing.*

Though under the evidence plaintiffs were entitled to \$1,500 or nothing, a verdict for \$1,000 will not be disturbed on appeal by defendant, it not appearing that there was any intentional misconduct on the part of the jury. Gaynor v. Clements, 16 Col. 209, 26 P. 324.

(r-4) *Erroneous theory immaterial where verdict is right.*

Where a judgment was for the right party, and in the interest of substantial justice, it will not be reversed on a writ of error because the court proceeded on an erroneous theory. Etna Indemnity Co. v. J. R. Crowe Coal & Mining Co. (Mo.), 154 F. 545, 83 C. C. A. 431, writ of certi. den. 207 U. S. 589.

(s-4) *Where verdict would have been the same had there been no error.*

Where the verdict is general a judgment must be reversed for any error, which is the subject of exception, unless it appears that both the verdict and the judgment would have been the same if there had been no error. Johnson v. Burden, 40 Vt. 567, 94 Am. Dec. 436.

(t-4) *Verdict awarding land to plaintiff, but finding improvements equalled rent and profits, not prejudicial to defendants.*

Error in an ejectment verdict awarding the land to plaintiff, but finding that the improvements equalled the rents and profits; the matter of improvements not being involved was error against plaintiff of which defendants can not complain. *Seger v. Abington*, 217 Mo. 568, 117 S. W. 704.

(u-4) *Error immaterial when facts found insufficient to support a verdict for plaintiff.*

Errors in the reasons assigned in the conclusions of law for giving judgment for defendants where, on a trial before the court, without a jury, a special finding has been filed, will not warrant a reversal of the judgment, when the facts found are not sufficient to support a judgment for the plaintiff. *Hamblin v. Warner*, 30 Mich. 95.

(v-4) *Erroneous reasons immaterial where result is proper.*

Where the result of the verdict is the right one, the reasons given by the court for such action, even though erroneous, can not be prejudicial. *Wilson v. R. Co.*, 94 Mich. 20, 53 N. W. 797; *Grand Lodge v. Barker*, 139 Mich. 701, 12 D. L. N. 49, 103 N. W. 193; *Van Cleve v. Redford*, 149 Mich. 106, 14 D. L. N. 376, 112 N. W. 754.

(w-4) *On second appeal the supreme court will not set aside the verdict.*

Where a cause, depending mainly on matters of fact, had been submitted to five judges, and three verdicts had been given for plaintiff and two other juries were unable to agree, and on appeal the cause was remanded for a new trial, and a fourth verdict was afterwards had for the plaintiff, on the second appeal the supreme court refuses to set aside the verdict. *Myers v. Stock*, 6 La. Rep. 138; *Bowman v. Flower*, 11 La. Rep. 514.

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(x-4) *Jury finding aggregate verdict, instead of separately, on two notes.*

In an action on two notes, where the court directs the jury, if they find for the plaintiff, to find how much is due, if anything, on each note, it was harmless error for the jury to disregard such direction and find the aggregate amount of both notes. *Luke v. Johnnycake*, 9 Kan. 511.

(y-4) *The court below being satisfied with an excessive verdict it will be affirmed.*

The court below, having full opportunity of understanding whether the verdict is excessive should fearlessly assume the responsibility of setting it aside on that ground, but the supreme court will be very reluctant to disturb a verdict in this respect. *Bower v. R. Co.*, 42 Iowa 546; *Brown v. Jefferson County*, 16 Iowa 339.

(z-4) *There is no error when verdict based on another paragraph.*

Where it appears from the special finding of fact by the jury, as shown by their answers to interrogatories, that the general verdict is based on the first paragraph of the complaint, no reversible error can be predicated on overruling a demurrer to the second paragraph of the complaint. *R. Co. v. Sudhoff* (Ind. Sup.), 90 N. E. 467; *Burkham v. Bank*, 96 Ind. 270.

(a-5) *A verdict will not be set aside, merely because the appellate court would have viewed the evidence differently.*

A court of appeals should not set aside the verdict merely on the ground that they would have viewed differently if they had been sitting as jurors. *R. Co. v. Foster*, 74 Ill. App. 387.

(b-5) *Where the theory supports a verdict, there being no error of law, it will not be disturbed.*

Where there is a theory upon which the evidence would justify the verdict, if that theory had been formulated in instructions, the verdict can not be disturbed, there being no error in law. *Dixon Nat. Bank v. Spielman*, 43 Ill. App. 475.

(c-5) *Mere informality of verdict not ground of error.*

A judgment will not be reversed for informality in the verdict, where it can be seen that the verdict was responsive to the issues. *Daft v. Drew*, 40 Ill. App. 266.

(d-5) *Special verdict conclusive that decedent did not know of defect in fly-wheel which caused his death.*

A special finding by the jury, in an action for wrongful death caused by a fly-wheel that the plaintiff's decedent did not know of the defect, is conclusive in a reviewing court, although it may be doubtful whether, had the question been asked the jury, it could not have been that, by the exercise of ordinary care, decedent would not have known of the defect; unless the verdict is clearly against the weight of the evidence the verdict should stand, and particularly, where the court directed the jury that such a finding was essential to a recovery by the plaintiff, in whose favor it was rendered. *Stone Co. v. Richardson*, 22 O. C. C. 139, 12 O. C. D. 177.

(e-5) *Verdict of jury on ground of insecurity of elevator fastening will not be disturbed.*

Where a block and pulley connected with the operation of an elevator are fastened in place by nails only, a finding by the jury that the insecure fastening was the proximate cause of the falling of the appliance and injury to the plaintiff employed underneath will not be disturbed. *Traction Co. v.*

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George, 13 O. C. C. n. s. 209, 22 O. C. D. 403, affm'd w. o. 86 O. S. 339.

(f-5) *Questionability of correctness of verdict insufficient to warrant a reversal.*

That there may be considerable question as to whether a verdict is right is not sufficient grounds for reversal. R. Co. v. Thompson, 21 O. C. C. 778, 12 O. C. D. 326.

(g-5) *Defendant is not prejudiced by the remission of a part of a verdict in plaintiff's favor, and can not complain thereof.*

The remission by plaintiff of a part of a verdict in his favor in accordance with the condition of the denial by the trial court of a motion for a new trial by defendant, on the ground that the damages awarded were excessive, is without prejudice to defendant, and he can not complain thereof on appeal. Sills v. Hawes, 14 Colo. App. 157, 59 P. 422.

(h-5) *On conflicting evidence preponderance must be very strong to induce an appellate court to interfere with a verdict.*

Where the record shows that there was a total absence of evidence to support the verdict, the supreme court will not hesitate to set the verdict aside; but where there was conflicting evidence the preponderance against the propriety of the verdict must be very strong to induce the court to interfere. Bridier, Exr., v. Yulee, 9 Fla. 481.

(i-5) *Where verdict is supportable from two aspects, error as to one will not disturb it.*

Unless the errors which are complained of are such as to vitiate both aspects of a verdict, a judgment rendered upon such verdict must be affirmed, since the verdict and judgment could be supported equally well by the other aspect of

such case, which was not affected by the error in question. *Butler v. Kneeland*, 23 O. S. 196; *Beecher v. Dunlap*, 52 O. S. 64; *Gates v. Banking Co.*, 22 O. C. C. 724, 11 O. C. D. 721.

(j-5) *Verdict for defendant properly directed, when one for plaintiffs could not properly have been rendered.*

No error is committed by the trial court in directing a verdict for the defendant, after the conclusion of the testimony adduced by the plaintiffs, on motion of the defendant, especially when no objection or protest was made by the defendant to such direction, no request was made for the privilege or right of making an argument to the jury, no exception was taken or noted to such direction at the time, but only on the motion for a new trial, and, assuming as true all the evidence adduced by the plaintiffs which was admitted, and viewing it in the most favorable light for the plaintiffs, a verdict could not have been properly rendered in their favor. *Hoopes v. Crane*, 56 Fla. 395.

(k-5) *General verdict will not be disturbed unless clearly inconsistent.*

A general verdict will not be disturbed unless it is clearly inconsistent with any theory provable under the issues that the evidence may tend to support. *Bridge Co. v. Yost*, 22 O. C. C. 376, 12 O. C. D. 448.

(l-5) *Verdict not assessing value of property and damages for detention not ground of complaint by appellant.*

Where plaintiffs in replevin took possession of the property under the writ, and there was a verdict for defendant for return of the property, plaintiffs could not complain because the verdict did not also assess the value of the property and damages for its detention, as required by Revised Statutes 1881, sec. 549. *Cabell v. McKinney*, 31 Ind. App. 548.

(m-5) *Verdict for nominal damages ordinarily not disturbed.*

Plaintiff is not entitled, as a matter of law, to have a verdict for nominal damages set aside, unless her case is such that if the verdict had been for the defendant she would have been entitled to have the verdict set aside; in other words, where the jury has returned a verdict for nominal damages, in a case where the plaintiff is not entitled to any damages, the verdict will not be set aside by the appellate court at the instance of the plaintiff. *Haven v. R. Co.*, 155 Mo. 216, 55 S. W. 1035.

(n-5) *Several verdicts being alike, court will affirm unless clearly wrong.*

Where there have been several trials before a jury, and the jury, in each case, the issue being single, found the same way, the court will not reverse on the ground that the finding is wrong, unless well satisfied that it is so. *Davis v. Gurney*, 38 Ill. App. 520; *De Soto v. Buckles*, 40 Ill. App. 85; *R. Co. v. Nash*, 12 Fla. 497; *Huling v. Bank*, 19 Fla. 695; *Valdosta Merc. Co. v. White*, 56 Fla. 704; *Whitman v. Keith*, 18 O. S. 134; *Insurance Co. v. Cheever*, 36 O. S. 201; *Ins. Co. v. Whittaker*, 13 O. C. C. n. s. 65, 22 O. C. D. 297, *affm'd w. o.* 84 O. S. 476, 84 O. S. 493; *Insurance Co. v. Cranahan*, 19 O. C. C. 114, 10 O. C. D. 186, *rev.* 63 O. S. 258.

(o-5) *Verdict establishing right to relief against nuisance.*

In an action for damages caused by nuisance and to restrain such nuisance, which demanded and obtained a trial by jury, plaintiff had a verdict for \$25 damages. The court upon the evidence given before the jury found the facts relating to the equitable questions in the case, and entered judgment for the purported injunction and for the \$25 damages. Held that, although the further finding of facts

by the court was irregular the judgment entered might be sustained, because the verdict necessarily established the right to relief against the nuisance. *Parker v. Loney*, 58 N. Y. 469, rev. 1 T. & C. 590.

(p-5) *Directing verdict for defendant when plaintiff entitled to nominal damages not reversible error.*

On counts for trespass to realty, where there is evidence of a technical trespass, but no substantial damages to the freehold or to plaintiff's possession are shown, and there is not disclosed any important right to be vindicated by the awarding of nominal damages, and the costs recoverable could not exceed the damages, it is not reversible error to direct a verdict for defendants. *Williams v. Alabama Cotton Oil Co.* (Ala. Sup.), 44 S. 957; *Shelton v. Bornt* (Kan. Sup.), 93 P. 341.

(q-5) *Where verdict is for the right party, sustaining a motion for a new trial for errors in instructions will be reversed.*

Where the verdict and judgment are for the right party an order sustaining a motion for a new trial because alleging errors in the instructions will be reversed. *Puttermann v. Simon*, 127 Mo. App. 511, 105 S. W. 1098.

CHAPTER IX.

ACTIONS AT LAW AND CHOSSES IN ACTION.

- Sec. 233. Agreements.
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COMMON CARRIERS.

- 235. Evidence admitted.
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Sec. 233. Agreements.

- (a) *Harmless error in excluding stipulation between the parties.*

On trial before the court, any error in the exclusion of a stipulation between the parties, offered in evidence, is immaterial, since the stipulation may be considered as of equal value to a finding. *Redpath v. Evening Express Co.* (Cal. App.), 88 P. 287.

- (b) *Permitting oral proof of contents of lost agreement.*

Where the court was satisfied that the paper containing an agreement between plaintiff and another was lost or could not be found for use at the trial, after proper search had been made for its discovery, its action in permitting secondary evidence to prove the contents of the paper was, at most, not such an error as to call for reversal of the judgment which, upon all the facts of the case, seemed just and right. *Liles v. Liles*, 183 Mo. 326, 81 S. W. 1101.

- (c) *Allowing agreement under lease to supersede levy under execution.*

Plaintiff leased land from one C, agreeing to deliver, "in lieu of rent, 1,000 bushels of wheat of good quality and grade, or the average wheat grown, with good care, on said premises during said term." Plaintiff assigned the lease to one L, who agreed to deliver to C 1,000 bushels of wheat grown on the premises. In an action by plaintiff to recover wheat grown on the premises and seized under execution against L, plaintiff was allowed to show that he had agreed to deliver to C wheat grown on the premises. Held that, though the admission of such evidence was erroneous, because it was immaterial, the error was harmless, since the agreement of L re-

quired the delivery to C of wheat grown on the leased premises. *Howard v. Barton*, 28 Minn. 116, 9 N. W. 584.

(d) *Agreement to set aside will introduced against contestants.*

In a will contest, some of the contestants, who were also devisees, entered into a written agreement and solicited other devisees to join in it, whereby they agreed to have the will set aside and divide the estate among the signers, as if deceased had died intestate. All the contestants did not sign the paper, and some of the devisees who would have been deprived of their interests by the proposed agreement were infants. This writing was introduced in evidence against contestants. Held, not reversible error, as it was either harmless or else a proposition to unlawfully suppress a will, and consequently relevant as affecting the good faith of the contestants. *Williams v. Williams*, 24 Ky. L. R. 1326, 71 S. W. 505.

(e) *Where copy of agreement has been erroneously rejected, cured by witness giving substantially a copy of contents of original from recollection.*

Where a copy of an agreement, fully verified, has been erroneously rejected, the error will be cured by allowing the same witness who verified the copy, to testify from recollection to the contents of the original, where he was able to state it fully, almost in the language found in the rejected copy. *Fowler v. Hoffman*, 31 Mich. 215.

(f) *Charge failing to give reason why agreement, if acted upon, would make mortgage invalid.*

Where the court instructs that if property was taken possession of and disposed of under a chattel mortgage and a certain agreement, the mortgage would be void, but if it was taken possession of and disposed of under

the agreement and a power of attorney, the mortgage would be valid, it is immaterial that the court did not correctly state why it claimed that the agreement, if acted on, would make the mortgage invalid. *Hargadine-McKittrick Dry Goods Co. v. Bradley*, 4 Ind. Ter. 242, 69 S. W. 862.

(g) *Agreement reserving right to plaintiff to sue for future damages cured by instruction that such could not be recovered.*

The admission of an agreement, reserving to plaintiff, in an action against an elevated road, the right to sue for future damages held, cured by an instruction to the jury that such damages could not be recovered. *Malcolm v. R. Co.*, 36 St. Rep. 741, 13 N. Y. Supp. 283.

(h) *Counsel agreeing that witness's testimony be read to jury, if all was read, and only a part was read.*

Where counsel agreed to permit a witness's testimony to be read in the jury room, if all of it was read, and the stenographer read part of it to the jury, when they told him they had heard enough and excluded him from the room, his failure to read the rest of it was harmless error, it not appearing that the jury knew of the agreement that all of the testimony should be read. *Quinn v. R. Co.*, 218 Mo. 545, 118 S. W. 46.

(i) *Refusal to charge as to an express agreement to collect for a ten percent compensation.*

Where the action was to recover as for money had and received, after its collection by defendant for plaintiff, in which defendant claimed he was entitled to fifty percent as reasonable compensation, in the absence of an express agreement, but plaintiff claimed that there was an express agreement for a ten percent compensation, a requested instruction for defendant that any contract for ten percent compensation must have been made between plaintiff

and defendant before the suit, was not so irrelevant to the issues as to make its refusal reversible error, the action not being on the contract, especially in view of the fact that the question of an agreement for ten percent compensation was sufficiently covered by other instructions. *Jenkins v. Clopton*, 141 Mo. App. 74, 121 S. W. 759.

(j) *Refusal to charge of the existence of an agreement shown unfounded by the verdict.*

Where, in a forcible entry and detainer, a requested instruction based on the assumption that there was evidence tending to show that defendant entered under a provision for re-entry in the lease and an agreement by plaintiff to yield possession, which was refused, and the case, upon this point, was fairly submitted to the jury, and judgment was rendered for plaintiff; the jury must have found that there was no such agreement, and there was no error. *Seitz v. Miles*, 16 Mich. 456.

(k) *Instructing that an agreed scale may be accepted as correct, rather than it is binding.*

The only question for the jury being how much lumber defendants received of plaintiffs, other than that of which they made an agreed scale, any error in instructing that an agreed scale may be accepted as correct rather than it is binding, was harmless. *Poler v. Mitchell*, 152 Wis. 583, 140 N. W. 330.

(l) *Recovery on mistaken view of agreement upon which suit is based where entitled to recover in any event.*

That plaintiff recovers on a mistaken view of the character of the agreement upon which the suit is based, is not ground for reversal, where he is entitled to recover in any event. *American Structural Steel Co. v. Rush*, 107 N. Y. Supp. 3.

Sec. 234. Breach of promise of marriage.

- (a) *Where declaration for breach of marriage did not allege seduction, admission of letter in evidence showing both.*

Where the declaration, in an action for breach of promise of marriage, did not allege seduction, the admission of letters which showed not only a breach of the marriage promise, but the seduction, where the court charged the jury to disregard the portion of the letters relating to seduction, was not prejudicial. *Hendry v. Ellis*, 64 Fla. 306, 60 S. 354.

- (b) *In action for breach of marriage promise admission of evidence that the father of defendant was president of steel foundry company.*

In an action for breach of marriage promise, the admission of evidence that the father of the defendant was president of a steel foundry company, is not sufficient ground for reversal as inducing a verdict for a larger damage than would otherwise have been awarded. *Luther v. Shaw* (Wis. Sup.), 147 N. W. 17.

- (c) *In action for breach of marriage promise letters admitted which showed a child had been born as result of intimacy, cured by charge that they should be disregarded in estimating damages.*

In an action for breach of promise of marriage, where letters admitted, which were otherwise proper evidence, showed that a child had been born as a result of intercourse between the parties, which fact was not proper evidence in the case, an instruction that this evidence should be disregarded in the estimation of damages cured the error in its admission. *Hanson v. Johnson*, 141 Wis. 550, 124 N. W. 506.

(d) *Harmless error in the admission of evidence in breach of promise case.*

In an action for breach of promise of marriage, where the jury found in favor of the defendant, on the issue whether the contract was terminated by mutual consent, any error in the admission of evidence of the existence of a letter of harmony between the defendant, who was pastor of a church of which plaintiff was a member, and the plaintiff, with relation to church work, as tending to sustain the case made by defendant, that the engagement was terminated by mutual consent, was harmless error. *Justice v. Davis* (N. J. L.), 59 A. 6.

(e) *In breach of promise case, excluding evidence that two months after alleged promise plaintiff engaged herself to another.*

While, in an action for breach of promise of marriage, aggravated by seduction, evidence that two months after the alleged promise, plaintiff stated that she was engaged to be married to another person, admissible for consideration in mitigation of damages, its rejection was harmless, only \$800 damages having been allowed, and defendant, while denying the promise of marriage, admitting that when plaintiff entered his employ he promised her parents to look after her conduct, and that he debauched her. *Kirby v. Lower*, 139 Mo. App. 677, 124 S. W. 34.

(f) *In action for breach of marriage promise, defended on the ground that plaintiff suffered from debarring disease, instruction exacting a finding of want of knowledge by defendant.*

Where, in an action for breach of promise of marriage, defended on the ground that plaintiff had suffered from a disease, there was no evidence that plaintiff had

suffered from such disease at the time of the engagement, or that defendant had knowledge thereof at that time, an instruction which exacts a finding of want of knowledge by defendant at the time of the engagement, as a condition for the contract, if error, was not prejudicial. *Beans v. Denny* (Iowa Sup.), 117 N. W. 1091.

(g) *In action for breach of marriage promise evidence showed defendant worth \$75,000 to \$90,000, instruction which permitted jury to consider possible dower interest.*

In an action for breach of marriage promise, in which the evidence showed the defendant was worth from \$75,000 to \$90,000, any error in an instruction which may have permitted the jury to consider the possible dower interest which the plaintiff might have as defendant's widow is harmless, where the jury returned a verdict for only \$8,000. *McKenzie v. Gray* (Iowa Sup.), 120 N. W. 71.

COMMON CARRIERS.

Sec. 235. Evidence admitted.

(a) *Admitting evidence that no bell was sounded at crossing.*

Where plaintiff, in an action for death at a street railroad crossing, pending the issue of defendant's negligence in failing to warn decedent of the approach of the car by asking an instruction thereon, an instruction was given for defendant that the fact that no bell was sounded would not warrant a recovery; defendant was not prejudiced by the admission of evidence that no bell was sounded as the car approached the crossing. *Ellis v. R. Co.*, 234 Mo. 657, 138 S. W. 23.

(b) *Admitting evidence of theft in action for loss of goods.*

In an action for the loss of goods by theft while in defendant's custody, evidence of various acts of robbery and theft committed in the village where defendant's depot was located was admitted, apparently for the purpose of showing that defendant, as bailee for hire of goods in said depot, was bound to unusual care in caring against theft and robbery; but the evidence did not show any unusual liability from those causes in that village, as compared with other villages. Held, that the admission of the evidence was harmless. *Dimmick v. R. Co.*, 18 Wis. 471.

(c) *Admission of evidence of fatal nature of cancer alleged to have resulted from plaintiff's injury, though not pleaded.*

Defendant held not prejudiced by the admission of evidence of the fatal nature of a cancer alleged to have resulted from plaintiff's injury, though not pleaded. *R. Co. v. Thompson* (S. C.), 211 F. 889.

(d) *Allowing a daughter of plaintiff, suing for injuries, to state that her husband had been dead four years.*

The error, if any, in allowing a daughter of plaintiff, suing for personal injuries, to state that her husband, who had been a physician, had been dead for four years, was not ground for reversal, the question not having been asked for an improper purpose, and no prejudice resulting. *Boice v. R. Co.* (Iowa Sup.), 133 N. W. 657.

(e) *In action for injury to street-car conductor, admitting evidence that when car was disabled the employee longest in service was in control.*

Where, in an action for injuries to a street-car conductor by coming in contact with overhead wires while

on the top of the car holding a broken trolley-pole, the court charged that the motorman was a fellow servant, and that any directions given by him were not binding on the company, the error in admitting evidence that when the car was disabled the employee longest in service was in control, and that the motorman had been longest in the service, and that he directed the conductor to remain on the top of the car and hold the trolley-pole, was not prejudicial. *Pike v. R. Co.* (Iowa Sup.), 131 N. W. 50.

(f) *In action for injuries, reception of evidence of loss of time, though not pleaded.*

In an action for injury from blasting work, plaintiff was quite seriously and permanently injured, and only recovered a verdict of \$650, it was not prejudicial to defendant that evidence was erroneously received of loss of time, though not pleaded. *R. Co. v. Bowlin*, 143 Ky. 268, 136 S. W. 199.

(g) *In action against railroad for wrongful death, admission of testimony that the driver of the van was a careful and prudent man.*

In an action by a father against a railroad company for the death of his son while crossing the track on a furniture van driven by a third person, admission of testimony that the driver of the van was a careful and prudent man was harmless error, where it was shown to the jury that the driver looked and listened, but did not stop before going on the track, because the jury had all the facts before it as to what the driver did, and the answer of the witness was merely what would be presumed, without testimony in any event, so that it could have had no effect on the jury. *R. Co. v. Chiles* (Col. Sup.), 114 P. 661.

- (h) *In action for carrying passenger past her destination, permitting plaintiff to testify that the conductor's manner was rude and insulting.*

In an action for carrying a passenger by her destination, reversible error can not be predicated on permitting her to testify that the conductor's manner was rude and insulting, where no instruction authorized punitive damages, or in fact any damages on account of his manner. *R. Co. v. Romes* (Ky. Ct. App.), 127 S. W. 158.

- (i) *Admitting evidence that a carrier sued for assault by its brakeman retained the brakeman after the assault.*

Any error in admitting evidence that a carrier sued for an assault by its brakeman retained the brakeman after the assault, as tending to show ratification, was harmless, where the assault was committed in the scope of his employment. *Cathey v. R. Co.* (Mo. App.), 130 S. W. 130.

- (j) *In action for injuries from train, permitting plaintiff to testify that if he had heard the train he would not have driven on the track.*

Where, in an action for injuries in a collision with a train at a crossing, plaintiff testified that he stopped, looked and listened twice before entering the crossing, and that he neither saw nor heard a train approaching, the error, if any, in permitting him to testify that if he had heard a train he would not have driven on the track, was not prejudicial. *Stotelmyer v. R. Co.* (Iowa Sup.), 127 N. W. 205.

- (k) *In a railroad passenger's action for injury, testimony of plaintiff that he had started for a certain fair.*

In a railroad passenger's action for injuries, testimony of plaintiff that he had started for a certain fair, which was in progress at the time, did not prejudice defendant

as calculated to influence the action of the jury. R. Co. v. Farris (Tex. Civ. App.), 126 S. W. 1174.

- (l) *In action for injuries from a collision, evidence that shortly after the accident witness saw plaintiff, who complained about his knee and fingers.*

In an action for injuries from a collision between plaintiff's wagon and defendant's automobile on the highway, the admission of evidence that shortly after the accident witness saw plaintiff, and while defendant was within a few feet of him, and asked him if he was hurt, and that he complained about his knee and his fingers, if erroneous, was not prejudicial to defendant. Anderson v. Sparks, 142 Wis. 398, 125 N. W. 925.

- (m) *In action against a carrier for delay in delivering lumber, admitting evidence that all charter parties provided for demurrage, and that carrier knew it.*

Where, in an action against a carrier for delay in delivering lumber to a vessel, it appeared that the charter party stipulated for demurrage, and that the carrier knew of it before undertaking to deliver, error, if any, in admitting evidence that all charter parties contained such provisions was not prejudicial. R. Co. v. Lewis (Ala. Sup.), 51 S. 863.

- (n) *In action for death of workman, permitting witness to be asked whether decedent could have heard a whistle, had it been blown, before engine struck him.*

In an action for the death of a workman employed by the railroad on its bridge, from being struck by the train on another railroad passing under the bridge, while standing on the track to allow a train to pass over the bridge, where the situation, location and circumstances were shown, and in answer to a question the witness, an employee on the same job of decedent, and who had been

engaged in the same work for the same company, for example, testified that had the whistle been blown opposite to a designated post, and between it and where decedent was struck, witness could have heard it where he was standing, and he did not hear it; it was not reversible error to permit a witness to be asked whether decedent could have heard a whistle, if it had been blown at any time before the engine struck him. *R. Co. v. Peavler* (Ga. Sup.), 68 S. E. 432.

(o) *Error in permitting physician, in personal injury case, to testify to the effect on plaintiff's life of the removal of a kidney.*

The error in permitting a physician, who was testifying in a personal injury action, as to the effect of the removal of a kidney on plaintiff's life, to testify that he inquired of a superior officer of a life insurance company, as to whether they would accept plaintiff for insurance, was not reversible, there having been no answer to the inquiry, and the court having clearly informed the jury that the evidence should not be considered. *Alkire v. Myer's Lumber Co.* (Wash. Sup.), 106 P. 915.

(p) *In a personal injury action, admission of testimony that plaintiff's nervous condition, if not cured, "might" result in insanity.*

In a personal injury action, the admission of testimony that plaintiff's nervous condition, if not cured, "might" result in insanity, was not prejudicial error, especially in view of proof that she was a mental wreck. *R. Co. v. Allen* (Tex. Civ. App.), 117 S. W. 486.

(q) *In action against street railway for death of pedestrian, admitting declaration of conductor admonishing motorman to make no statement as to cause of accident.*

In an action against a street railway company for the

death of a pedestrian struck by a car, the error in admitting the declaration of the conductor, whereby he admonished the motorman not to make any statement as to the cause of the accident, was not prejudicial. *R. Co. v. Johnson's Adm'r* (Ky. Ct. App.), 115 S. W. 207, 20 L. R. A. n. s. 133.

(r) *In action for loss of cotton, evidence of two bales not lost.*

In an action for twenty-three bales of cotton lost out of a lot of twenty-five bales, the admission of evidence as to the weight of the two bales not lost, although irrelevant, is harmless, if subsequently made relevant by evidence showing the total weight of the twenty-five bales. *R. Co. v. Edmonds*, 41 Ala. 667.

(s) *Erroneous admission of evidence of intoxication of ship's doctor after giving passenger calomel for quinine.*

Plaintiff, a passenger on defendant's steamship, applied through the stewardess for quinine, which was distributed gratis to passengers. Calomel was given instead, with serious results. Plaintiff was permitted to show, against defendant's objections, that some days after the giving of the medicine, the ship's doctor was seen intoxicated. Afterwards, the court charged there could be no recovery for neglect of the doctor from any cause. Held, that the cause would be considered on appeal as if the evidence of intoxication had been rejected. *Allen v. State S. S. Co.*, 55 Hun 611, 8 N. Y. Supp. 803.

(t) *Improper evidence that defendant's rolling stock was considered dangerous.*

While it was improper to allow evidence that defendant's narrow gauge rolling stock generally was considered dangerous, its admission was without prejudice.

to defendant, where it was undisputed that the particular car which caused the accident was out of repair, and that its unsafe condition was the cause of the death. *Wells v. R. Co.*, 7 Utah 482, 27 P. 688.

(u) *In action for personal injuries asking co-servant as to degree of care exercised by plaintiff.*

In an action by a servant for personal injuries, the error of asking a co-servant as to the degree of care exercised by the plaintiff is not ground for reversal, if the servant's answer is unresponsive, and hence, not prejudicial. *Hatfield v. R. Co.*, 61 Iowa 434, 16 N. W. 336.

(w) *Evidence that after the accident the defective turntable was reconstructed.*

The admission of evidence, in an action to recover damages for the death of a railroad employee, alleged to have been due to a defective turntable, that after the injury the table was reconstructed, was not prejudicial error, where the jury were instructed not to consider it on the question of defendant's negligence in using this table. (*Ohio*) *R. Co. v. Ponn*, 191 F. 682, 112 C. C. A. 228.

(x) *In personal injury case evidence as to medicine and medical attention.*

In an action against a street railroad company for personal injuries, where the court, in charging the jury, limited plaintiff's recovery to reasonable compensation for her pain and suffering caused by the injury, the improper admission of evidence as to medicine or medical attention was harmless error. *Dent v. R. Co.*, 145 Mo. App. 61, 129 S. W. 1044.

(y) *Admitting testimony of sectionmen as to the proper manner of loading bars and tools on a hand-car.*

Where, in an action for injuries to a section-hand by

the derailment of a hand-car, caused by an iron bar falling from the car, the evidence showed that iron-bars and tools were laid on the platform of the car unsecured, any error in admitting the testimony of sectionmen as to the proper manner in which to load a hand-car to carry bars and tools was not prejudicial, it being within common observation that iron bars and tools would be jarred out of place when merely laid on the platform. *Landers v. R. Co.*, 156 Mo. App. 580, 137 S. W. 605.

(z) *Evidence as to the manner of constructing cattle-guards.*

Evidence as to the manner of construction of all cattle-guards in a neighborhood, including the one by which plaintiff's mule was injured, though not a proper method of proving the condition of the particular guard, was not such prejudicial error as to call for a reversal. *Barkbider v. R. Co.*, 152 Mo. App. 543, 133 S. W. 1170.

(a-1) *Evidence that tender was put out of commission after the accident.*

Where plaintiff, a switchman, alleged injury because of the use of a road tender on a switch engine, and it appeared that on the night of the injury the road tender had been placed on the switch engine in an emergency only, evidence that the tender was put out of commission the same night after the injury, and her number painted over, was not prejudicial to defendant. (*S. C.*) *R. Co. v. Linstedt*, 184 F. 36, 106 C. C. A. 238.

(b-1) *In action for personal injuries, permitting plaintiff to testify he was a married man.*

The error, if any, in permitting plaintiff, in an action to recover damages for personal injuries, to testify that he was a married man, is harmless where the fact is abundantly proved by evidence to which there was no

objection. *R. Co. v. Kennedy* (N. Y.), 82 F. 158, 27 C. C. A. 136.

(c-1) *Error in admitting evidence as to the speed of a freight train.*

Technical errors in the admission of testimony respecting the speed of a freight train, with which the train carrying plaintiff collided, were harmless, in view of the fact that the train was moving at such speed that it could not be stopped within the 100 feet at which the engineer at first saw the passenger train on the crossing. *R. Co. v. Stoner* (Ark.), 51 F. 649, 2 C. C. A. 437.

(d-1) *In action for death of brakeman, not error to admit evidence of overhanging waterspout.*

The admission of testimony, in an action to recover damages for the death of a railroad brakeman, alleged to be the result of a collision with an overhanging waterspout, that such spout was so reconstructed, after the accident, as to be farther removed from passing trains, is not error, where the jury are told that such change had no other bearing upon the issues involved than to test the correctness of the measurements offered in evidence by the railroad company to show that the waterspout did not constitute danger to brakemen on passing trains. *R. Co. v. McDade* (Tenn.), 191 U. S. 64, 48 L. ed. 96.

(e-1) *In action against railroad for negligence, excluding evidence that delay was caused by the Fourth of July.*

Though it is error to exclude evidence for defendant, in an action against a carrier for negligence for injury to a consignment of dressed-poultry, resulting from failure to care and preserve it, and from delay in delivery, that the delay was caused by the intervention of the 4th of July, which was observed by carrier and among busi-

ness men of all classes, by suspending business, and that the custom of suspending business on that day was an established one, general, certain and uniform, it is not cause for reversal under Shannon's Code, sec. 6351, providing that there shall be no reversal in the supreme court, except for errors which affect the merits of the judgment complained of, where the uncontroverted evidence shows that the carrier was negligent in failing to care for and preserve the poultry. *R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.

(f-1) *Incompetent evidence in action for street car injuries.*

Under allegations that plaintiff "was thrown against said car and severely injured in and about the head and body," and "by reason of the premises aforesaid was made sick, sore and lame, and was caused to suffer great bodily pain, and by reason of the permanent character of said injuries she may never recover therefrom," proof that she had, as a result, suffered a miscarriage and became unable to bear children, is not competent; but where defendant had allowed part of such evidence, without objection, and the amount of the verdict did not exceed proper compensation for the injuries shown to have necessarily flowed from the accident as pleaded; held, that its admission did not call for a reversal of the judgment. *Ranson v. R. Co.*, 98 App. Div. 101, 113 St. Rep. 588, 79 N. Y. Supp. 588, affm'd, 177 N. Y. 578.

(g-1) *Evidence of noise made by the operation of the elevated railroad.*

Evidence of the noise made by the operation of the elevated railroad while in a public street as an element of damages. Held, not to have prejudiced the defendant, where no mention of it was made in the finding. *Moss v. R. Co.*, 35 St. Rep. (N. Y.) 798.

(h-1) *In action to enjoin operating elevated railroad, admission of offer made for plaintiff's premises before road was built.*

In an action to enjoin the operation of an elevated railway, the admission of an offer made for plaintiff's premises before the building of the road; held, not fatal to the judgment, where it fully appeared that the award for loss of fee value was a reasonable one, and that there was the usual relation between the fee value and the rental value shown at the legal rate of interest. *Kuhn v. R. Co.*, 31 St. Rep. 406, 9 N. Y. Supp. 710, 58 Super. Ct. (16 J. & S.) 138.

(i-1) *Evidence as to delay in shipment of goods owing to low water.*

In an action by a carrier for freight charges, in which defendant denied plaintiff's right to compensation, on the ground that the goods were not taken at their destination, it appeared that this was caused by low water, which made it necessary to land the goods at the nearest point which plaintiff's boat could reach. The only witness who testified on the point stated that there was no delay in reaching the place where the goods were landed. Held, that evidence that no boat reached the point of destination during the season in which the goods were shipped, was harmless to defendant. *Silver v. Hale*, 2 Mo. App. 557.

(j-1) *Error in showing that cars have been run slower at the place where the accident happened since that time.*

The admission of evidence that defendant's cars had been run slower at the place where the accident occurred, since it happened, was harmless. *Bassett v. Los Angeles Traction Co.*, 133 Cal. xix, 65 P. 470.

Sec. 236. Evidence excluded.

- (a) *Excluding evidence that coach was set apart for colored people.*

Where an action against a carrier for the penalty imposed by Kentucky Statutes, sec. 795, was tried on the theory that the carrier failed to have signs indicating the race for which coaches was intended, the error in excluding evidence that the coach was set apart for colored people, and what the conductor said to white passengers, was not prejudicial. *R. Co. v. Commonwealth*, 149 Ky. 486, 149 S. W. 826.

- (b) *Refusal to admit evidence that had there been a man on the car at the time of the accident he could not have stopped the car.*

In an action for injuries to a child at a railroad crossing by a car on which there was no brakeman, it was not prejudicial to refuse to admit evidence that, even had there been a man on the car at the time of the accident, he could not have stopped the car, where the recovery was based on insufficient warning. *R. Co. v. Allmet*, 150 Ky. 831, 151 S. W. 14.

- (c) *In action against carrier for failure to unload sheep at feeding station, excluding evidence of difficulties of unloading sheep at night.*

Where, in an action against a carrier for failing to unload sheep at a feeding station, the evidence showed that the train arrived at the station before dark, and that the car was not moved to the sheep-pens until one o'clock at night, the exclusion of evidence of the difficulties of unloading sheep at night was not prejudicial. *Moore v. R. Co.* (Iowa Sup.), 131 N. W. 30.

- (d) *In action for ejection of a passenger, exclusion of evidence that plaintiff became more abusive than ever, but not giving language used.*

In an action for ejection of a passenger, the exclusion of evidence that plaintiff became more abusive than ever, but not giving the language used, was not reversible error. *R. Co. v. Moore* (Ala. Sup.), 41 S. 984.

- (e) *Exclusion of question as to how witness knew the sparks from the engine were alive, cured by his testifying he saw them thrown from the engine.*

In an action for damages from a fire caused by sparks from an engine, plaintiff was not prejudiced by the exclusion of the question to his witness as to how the witness knew that the sparks from the engine were alive, where the witness had testified that he saw live sparks thrown from the engine. *White v. R. Co.*, 142 Ind. 648, 42 N. E. 456.

- (f) *Exclusion of evidence as to on which side of the street plaintiff was driving.*

Where plaintiff, suing for injuries in a street car collision, testified that he was driving on the east side of the street, that the car struck the wagon with such force as to push it across to the west side of the street, and defendant sought to show that plaintiff was driving in the center of the street, the exclusion of the testimony of the plaintiff, in his deposition, as to where he was driving in the street was not reversible error. *Semple v. R. Co.*, 152 Mo. App. 18, 133 S. W. 114.

- (g) *Exclusion of evidence of value of plaintiff's animals killed on railroad track.*

The exclusion of evidence offered by defendant to establish the value of plaintiff's animals killed on defendant's railroad track was harmless, where plaintiff's

evidence, admitted without objection, was ample to sustain the court's finding as to the value, and it did not appear that the evidence offered tended to prove, directly or inferentially, that the animals were of less value than they were shown to be by plaintiff's witnesses. *Sinclair v. R. Co.*, 70 Mo. App. 588.

(h) *Striking out testimony that plaintiff, in alighting, hesitated about a minute.*

In an action against a street railway company to recover for injuries while alighting from one of defendant's cars, error, if any, in striking out testimony that plaintiff, in alighting from one of its cars hesitated about a minute, on the ground that it was a conclusion, is not cause for reversal. *Kenny v. R. Co.*, 37 Misc. 782, 76 N. Y. Supp. 904.

(i) *Exclusion of testimony as to the speed of an electric car.*

Exclusion of testimony of a witness for plaintiff, in a negligence case, as to the rate of speed of an electric car; held, not reversible error, where he was afterwards permitted to testify that it ran "very fast," and to indicate a jumping motion. *Wiberg v. Nassau Elect. R. Co.*, 54 App. Div. 541, 100 St. Rep. 1098, 66 N. Y. Supp. 1098.

Sec. 237. Instructions given.

(a) *Finding rendered harmless erroneous instruction as to duty to passenger.*

A court instructed that if the car had stopped for her to alight, but started before she could do so, and, while she was still in a position of safety, and the car had attained a dangerous rate of speed, as she knew or might have known, it was her duty to remain on board until the car was again stopped; and, if she attempted to alight while the car was moving at such dangerous rate

of speed, plaintiff could not recover because the car had been prematurely started. Held, that in view of the finding, any error in the instruction as to the passenger's obligation, and in the amount of care, was harmless. *R. Co. v. Hockett*, 159 Ind. 677, 66 N. E. 39.

(b) *Instruction telling the jury, "that sympathy for the injuries and disabilities of the plaintiff 'even' though you believe they exist," is an expression of doubt by the judge.*

The use of the word "even" in an instruction telling the jury, "that sympathy for the injuries and disabilities of the plaintiff, 'even' though you believe they exist," though erroneous as an expression of doubt on the part of the judge as to the existence of such injuries and disabilities, is not reversible error. *Dowd v. R. Co.*, 153 Ill. App. 85.

(c) *In an action for the death of a fireman, instruction that the jury must find that the car was being handled by the employees of the railroad company.*

In an action against a railroad company and a terminal company for the death of a fireman while attempting to extinguish a fire in a car containing explosives, the fire having resulted from the negligence of the employees of the terminal company in handling the car, an erroneous instruction that the jury must find that the car was being handled by the employees of the railroad company, was not ground for reversal, where, under the facts of the case, both companies were liable for the death. *R. Co. v. O'Leary* (Tex. Civ. App.), 136 S. W. 601.

(d) *Misstatement by the court, in its charge, that the seals were broken after the car had been placed on the track by the terminal carrier.*

Where, in an action against a terminal carrier for the

loss of goods, it appeared that the contract of shipment stipulated that no carrier should be liable for loss not occurring on its own line, nor after the property was ready for delivery to the next carrier or to the consignee, and that, at the time the seals on the car were broken and rolls of paper put in their place, the car was ready for delivery to the terminal carrier, and it exercised dominion over the car and its contents at the time, the misstatement of the court, in its charge, in stating that the seals were broken after the car had been placed on the tracks of the terminal carrier, was not prejudicial. *Podrat v. R. Co.* (R. I. Sup.), 78 A. 1041.

(e) *Instruction that railway companies were bound to use ordinary care to equip their engines with the "latest" appliances to prevent escape of fire.*

An instruction that railway companies sued for setting a fire were bound to use ordinary care to equip their engines with the "latest" appliances for preventing escape of fire, was harmless, where there was no testimony tending to show that there were any later or better spark arrester than those used by defendants. *R. Co. v. Gilbert* (Tex. Civ. App.), 136 S. W. 836.

(f) *Instruction that if decedent was a passenger, and had been pushed from the train by the porter, acting within his apparent authority, plaintiff could recover.*

In an action against a railroad company for the death of one alleged to have been pushed from a moving train while a passenger, a charge that if decedent was a passenger and had been pushed from the train by the porter, acting within the apparent scope of his authority, plaintiff could recover, though erroneous, where the uncontradicted evidence showed that it was not the porter's duty to collect fares or to put persons off the train, was

not prejudicial to defendant, since under such conditions defendant would be responsible for such wrongful act, regardless of the authority of the servant. *R. Co. v. Brown* (Tex. Civ. App.), 135 S. W. 1076.

(g) *Instruction authorizing recovery of "reasonable" instead of "market" value of live stock killed in transit.*

Error in authorizing a recovery of "reasonable" instead of "market" value of live stock killed in transit, was harmless, where the evidence was restricted to market value. *R. Co. v. Jones* (Tex. Sup.), 134 S. W. 328, rev. judgm't Civ. App. 123 S. W. 737.

(h) *Instruction in action for killing stock, that if defendant's servants neglected to sound the whistle and to ring the bell, plaintiff could recover.*

In an action against a railroad company for killing stock at a highway crossing, a charge that if the company's servants neglected to sound the whistle and to ring the bell plaintiff could recover, although erroneous as requiring both the sounding of the whistle and the ringing of the bell, while under the statute, the giving of either signal was sufficient, was harmless where the undisputed evidence showed that neither signal was given. *Tate v. R. Co.* (Mo. App.), 134 S. W. 14.

(i) *Improper showing of repair of defective road-bed after the accident cured by instruction to jury to disregard testimony.*

In a suit against a railroad for damages arising from a defective road-bed, the court allowed plaintiff to show the alterations made by the roadmaster after the accident, but instructed the jury to disregard the testimony entirely, as it had been improperly admitted; held, that the jury could not have been misled on the subject. *R. Co. v. Madison* (Ohio), 123 U. S. 524, 31 L. ed. 258.

- (j) *Instruction that a contract of agreement between a railroad company and a line of steamers was in good faith or was oppressive, as a monopoly, was a mixed question of law and fact.*

The question as to whether a contract or agreement entered into between a railroad company and a line of steamers plying between Jacksonville and Sanford, was entered into in good faith, and was legal and binding, or that such contract constituted an oppressive monopoly; and hence, was not legal and binding, is a mixed question of law and fact, and it was properly left to the jury to be passed upon by them. *R. Co. v. Rhodes*, 25 Fla. 40.

- (k) *In action against railroad for injury to animals, error in admitting evidence as to fences cured by charge limiting liability.*

In an action against a railroad company for injury to animals, the error of admitting evidence as to the condition of fences, a considerable distance from the place in question, and for years before the accident, is cured by instructing the jury that they have no right to consider whether the fences were sufficient or insufficient, other than the panel of fence through which the animals went when they were injured. *R. Co. v. Kendall*, 49 Ill. App. 398.

- (l) *Erroneous evidence as to condition of track not at place of accident, cured by limiting in charge to defect alleged in the petition.*

In an action against a railroad company for damages for personal injuries sustained in an accident, evidence was given for plaintiff as to the condition of the track one and one-half miles from the place of the accident. Held, that while such evidence was incompetent and inadmissible, yet the error was cured by an instruction

limiting the consideration of the jury to the defects specifically charged in the petition. *Sidekum v. R. Co.*, 93 Mo. 400, 4 S. W. 701.

(m) *Erroneous evidence of condition of plaintiff a year after the accident cured by charge to disregard unless the result of injury.*

The admission of evidence as to the condition of the plaintiff about a year after the accident, in consequence of an abscess which then appeared, even if erroneous, is not prejudicial to defendant, where the jury are expressly instructed not to give damages on account thereof, unless they are reasonably certain that the abscess was the result of the injury. *Heath v. R. Co.*, 57 N. Y. Super. Ct. (25 Jones & S.) 496, 8 N. Y. Supp. 863.

(n) *Instruction that plaintiff made out a prima facie case by showing she was a passenger.*

In an action against a street railroad company by a passenger who was injured in alighting from the side of a car of the defendant farthest from a station platform, the plaintiff did not rest with proof of the injury merely, and the question of defendant's negligence and the plaintiff's contributory negligence was submitted to the jury in proper special instructions; but the trial court, in its charge, voluntarily instructed the jury that the plaintiff made out a prima facie case by showing that she was a passenger, and thereby shifted the burden to defendant, and showed that the injury was not caused by the defendant's negligence, and then charged that the burden of showing contributory negligence was on the defendant, and gave the law applicable thereto. Held that, if the trial court committed error in the statement in regard to a prima facie case, in the application of the facts, it was not error prejudicial to defendants. *R. Co. v. Hill*, 34 App. D. C. 304.

- (o) *Error in language employed in charge in regard to placing hand-car "beside of" a highway, instead of using the phrase, "on or in the highway," was harmless.*

A charge that it was prima facie unlawful for a railroad to place a hand-car "beside of" a highway, instead of using the phrase, "on or in the highway," was harmless, where the jury expressly found in answer to special interrogatories, that the hand-car was placed "in the road," and on the traveled part thereof. R. Co. v. Norman, 165 Ind. 126, 74 N. E. 896.

- (p) *Erroneous instruction as to a contract modifying a carrier's common law liability.*

In an action for injury to goods by carriers, an instruction erroneously stating that a contract modifying a carrier's common law liability must be in writing, was harmless, where no such contract was pleaded or proved. R. Co. v. Schaefer (Ind. App.), 90 N. E. 502.

- (q) *Erroneous instruction as to speed of street car.*

Where the evidence and the answers to interrogatories returned with the general verdict, showed that the defendant was negligent in the operation of the car, the fact that the instructions, the body of which contained a correct statement of the law, erroneously stated that the car might be run at the highest rate of speed in the suburbs, or sparsely settled parts of the city, than in a populous or crowded portion thereof, was not cause for reversal. R. Co. v. O'Donnell, 35 Ind. App. 312, 73 N. E. 163, 74 N. E. 253.

- (r) *In action for damages for personal injuries, charge that "money is an adequate recompense for pain."*

Where, in an action for damages for personal injuries,

the whole charge of the court is on the theory that exemplary damages can not be given, and the jury is instructed that the measure of plaintiff's recovery is what is called compensatory damages; that is, such sum as will compensate her for the injuries she has sustained, it is not reversible error to say in such charge that, "money is an adequate recompense for pain." *Morgan v. R. Co.*, 95 Cal. 501, 30 P. 601.

(s) *Instruction that it was not the duty of motorman to anticipate that plaintiff would put his arm within radius of brake handle.*

In an action against a street railway for personal injuries received by a passenger, by being struck on the arm by the brake handle, while riding on the front platform of the car, where the evidence tended to show that the plaintiff had ample room to keep out of the way of the brake handle. He knew the handle was there, that the signal had been given for the car to start, and knew the brake handle would immediately begin to revolve, but placed his arm within its radius. Though it is error to charge that it was not the duty of the motorman to anticipate that plaintiff would put his arm within the radius of the brake handle, it is not cause for reversal, the evidence showing conclusively that plaintiff was guilty of negligence in having placed his arm within the radius of the brake handle, the danger of which was known to him. *Brewer v. St. Louis Transit Co.*, 105 Mo. App. 503, 79 S. W. 1021.

(t) *Instruction that if injury was caused by running engine over five miles an hour, plaintiff entitled to recover.*

In an action for injuries to plaintiff while walking on defendant's track in a city whose ordinances limited the speed of trains to five miles an hour, a charge that plain-

tiff was entitled to recover if the injury was directly occasioned by defendant's engine being run at a greater speed than five miles an hour, though plaintiff was a trespasser, unless she saw or heard the train coming in time to avert the injury, in so far as it erroneously permitted plaintiff to be regarded as a trespasser, was harmless to defendant. *Murrell v. R. Co.*, 105 Mo. App. 88, 79 S. W. 505.

(u) *Instruction imposing a higher degree of care on railways for safety of passengers than law requires.*

Where, under the undisputed evidence, in an action by a passenger for injuries sustained in a railway collision, the defendant was prima facie guilty of actionable negligence, and there was no evidence tending to overcome it, an instruction that it was the duty of the carrier to carry the passengers safely, as far as it was capable by human care, though imposing on the carrier a higher degree of care than the law imposed, was not prejudicial. *Magrine v. R. Co.*, 183 Mo. 119, 81 S. W. 1158.

(v) *Instruction for injuries requiring as a right to recover that plaintiff looked and listened for cars.*

Where, in an action for injuries in a collision between a street car and a vehicle in which plaintiff was riding, plaintiff's negligence, if any, was not continuous to the instant of the collision, and did not directly concur in producing the collision, a provision in an instruction in favor of plaintiff, on discovered peril, etc., limiting plaintiff's right to recover on a finding that, prior to and at the time of the collision, she and her husband were exercising ordinary care to look and listen for the approach of cars, and to avoid injury, was superfluous and not prejudicial to defendant. *Degel v. St. L. Transit Co.*, 101 Mo. App. 56, 74 S. W. 156.

- (w) *Erroneous charge in a case of negligence that it was the duty of the man in charge of train to stop it, if it could have been done after seeing deceased.*

It was harmless error to charge that it was the duty of the man in charge of the train to have stopped it, if they could have done so by the exercise of ordinary care after seeing deceased; since, as there was no pretense that anyone on the train saw deceased, the trainmen having placed themselves where they could not see the track, the jury could not have been misled thereby. *Morgan v. R. Co.*, 159 Mo. 262, 60 S. W. 195, Marshall & Sherwood, JJ., dissent.

- (x) *Instruction incorrectly describing deceased as passengers.*

Where deceased were riding on defendant's freight train, with the consent of the conductor, defendant owed them at least ordinary care, and therefore, though the instruction referred to them as passengers, still, having limited defendant's duty to ordinary care, such reference could not be prejudicial. *Berry v. R. Co.*, 124 Mo. 223, 25 S. W. 229; *Wagner v. R. Co.*, Id.; *Zuent v. R. Co.*, Id.

- (y) *Instruction in action for killing a cow, that plaintiff could recover only if the killing was wilful and reckless.*

In an action against a street railroad company for killing plaintiff's cow, an instruction that plaintiff could only recover if the killing was wilful and reckless, and that unless defendant, when it saw the cow on the track, or had reason to believe it would go on the track, did nothing to prevent running against the cow, the jury could not find for plaintiff, was not prejudicial to defendant. *Airkaines v. R. Co.*, 138 Mich. 194, 11 D. L. N. 524, 101 N. W. 264.

(z) *Instruction improperly mentioning the mother as entitled to part of the damages awarded.*

The jury were instructed that if they found for plaintiff, the administrator, they might determine what proportion of any damages recovered should go to the father or mother of the deceased. There was some question whether, under the Virginia Statute, they were entitled to direct any portion to be given to the mother. A proper instruction as to the measure of damages was also given. Held, that such mention of the mother, even if error, could not be considered to have influenced the jury to consider her needs in fixing the amount of their verdict, and was harmless to defendant. *R. Co. v. Pointer's Adm'r*, 113 Ky. 952, 24 Ky. L. R. 772, 69 S. W. 1108.

(a-1) *Instruction cured erroneous evidence as to the movement of trains, etc.*

The error, if any, in admitting testimony as to the movement of the train, was harmless, as the court admonished the jury at the time that plaintiff could not recover on account of the movement of the train, and that point was also well guarded in the instructions given. *R. Co. v. Cooper*, 23 Ky. L. R. 290, 62 S. W. 858; *R. Co. v. Stewart*, 23 Ky. L. R. 637, 63 S. W. 596.

(b-1) *Error in admitting evidence of condition of track remote from the scene of the accident, cured by instruction to jury.*

In an action against a railroad for injuries to a passenger sustained by the derailment of a train, error in admitting incompetent evidence as to the condition of the track on a portion of the road remote from the scene of the accident is cured by instructions that the jury were not to consider any alleged defects in any part of the

road other than such as directly caused or might contribute to the injury, and to limit their findings to compensatory damages. *R. Co. v. Fox*, 74 Ky. (11 Bush) 495.

(c-1) *In action against railroad for injuries to cattle, instruction submitting to jury whether or not fence was a lawful one.*

In an action against a railroad company for injuries to cattle caused by the defective condition of the fence along its right of way, the giving of an instruction submitting to the jury the question, as to whether or not the fence, as originally constructed, was a lawful fence, in the absence of any evidence showing that it was not a lawful fence, and in the face of a presumption that it was a lawful one, though error, was not prejudicial, where the evidence that the fence was defective, and that such defect was of long standing, was so conclusive that the judgment was manifestly for the right party. *Hax v. R. Co.*, 123 Mo. App. 172, 100 S. W. 693; *Ayers v. R. Co.*, 124 Mo. App. 422, 101 S. W. 689.

(d-1) *In action for injuries to switchman, instruction failing to require finding that defendant owned the tracks or had leased them to switchman's employer.*

Where, in an action against a railway company for injuries to a switchman, while uncoupling cars in a switch yard leased by defendant to another company, and by defendant to his employer, the court charged that Revised Statutes 1899, sec. 1060 (Annotated Statutes 1906, p. 915), making a railroad company leasing its road to another liable as if operating the road itself, did not contemplate that defendant, as lessor, should be liable to the employees of the sub-leasee in operating its trains, a defect in an instruction that if the switchman was re-

quired to go between the cars in the yards of defendant to uncouple them, and while the cars were in motion, the foreman of the switching crew negligently drew the coupling pin connecting the cars, causing the injury complained of, the verdict should be for the switchman, etc., arising from defendant's failure to require the jury to find that defendant owned the tracks where the injury occurred, or that it had leased the same to the switchman's employer, was not prejudicial. *Brady v. R. Co.*, 206 Mo. 509, 102 S. W. 978.

(c-1) *In action for delay in shipping live stock, instruction limiting recovery to net loss in whole transaction.*

Where, in an action against a carrier for delay in shipping live stock, the shipper only claims damages for delay in shipping to their destination; but, on cross-examination, the fact was developed that the stock was reshipped and sold upon another market; and, on redirect examination, the transaction was fully shown, an instruction limiting plaintiff's recovery to the net loss incurred in the whole transaction was not prejudicial to the carrier, where the evidence showed that this was considerably less than the shipper would have been entitled to, if the stock had not been reshipped. *Tiller & Smith v. R. Co.* (Iowa Sup.). 112 N. W. 631.

(f-1) *Instruction that it is the duty of a railroad to sound the whistle or ring the bell at crossings.*

Error in declaring that it is the duty of a railroad to sound the whistle or ring the bell continuously on approaching a crossing, whereas the statute only requires it to be done at intervals, is harmless, where the proof is uncontradicted that the bell was not rung or the whistle sounded at all. *Alexander v. R. Co.*, 19 Mo. App. 312; *R. Co. v. Schneider*, 40 Ind. App. 38, 80 N. E. 985.

(g-1) *In action for death at railroad crossing, charge that if engineer fails to ring the bell within 500 yards of crossing, etc., it is negligence.*

In action for death at a railroad crossing, a charge that if any locomotive engineer on a railroad train fails to ring a bell within 500 yards of a crossing, etc., and keep it ringing until the engine passes the crossing, or to blow the whistle, etc., and keep it blowing, etc., the law says they are negligent, was not prejudicial error, even though it held defendant to a stricter and different rule than that required by the statute, where the defendant's testimony was to the effect that the engineer simply blew the signal for the crossing, and then commenced the ringing of the bell by an automatic ringer, and that the ringing continued until the train had proceeded beyond the crossing. *Herbert v. R. Co.*, 78 S. C. 537. 59 S. E. 644.

(h-1) *In action for personal injuries instruction that plaintiff was entitled to recover such sum as would compensate him for expenses of medical treatment.*

Where, in an action for personal injuries, the reasonableness of the expenses which plaintiff had incurred for medical treatment, etc., was not disputed, an instruction that plaintiff was entitled to recover such sum as would compensate him for the expense he had incurred for medical treatment during the time he was disabled, while erroneous, as not limiting the expense to the necessary and reasonable value of the medical services, was harmless. *Malone v. R. Co.* (Cal. Sup.), 91 P. 522.

(i-1) *Instruction that if carrier was negligent in encouraging the passenger to board the train while in motion, and by a sudden jerk the car threw him on the ground, verdict should be for plaintiff.*

An instruction, in an action against a carrier for in-

juries to a passenger while attempting to board a moving train, based on the negligence of the conductor in starting the train before the passenger could board it, that if the carrier was negligent in encouraging the passenger to board the train while in motion, and that while he was attempting to do so, the carrier was negligent in causing its train, by a sudden jerk, to throw him on the ground, a verdict should be rendered in his favor, unless he was guilty of contributory negligence, was not prejudicial to the carrier, though it was erroneous, as imposing on the passenger the burden of showing that there was a sudden jerk of the train at the time he attempted to board it. *R. Co. v. Bennett* (Ark. Sup.), 102 S. W. 198.

(j-1) *Charge that burden is on common carrier to prove shipper's assent to stipulations of bill of lading.*

It is error for the court to charge that the burden is upon a common carrier to prove the shipper's knowledge of and assent to the stipulations of the bill of lading which he has accepted, without objection; but such error is not material where the stipulation to which the charge applied was void. *Merchants' Transport. Co. v. Bloch*, 86 Tenn. 392.

(k-1) *Charge defining negligence, using objectionable clause, "without negligence on plaintiff's part proximately contributing to produce the accident."*

An instruction defining negligence as the neglect to use ordinary care or skill toward a person; to whom the defendant owes the duty of observing ordinary care and skill, by which the plaintiff, "without negligence on his part proximately contributing to produce the accident," has suffered injury to his person, while objectionable for containing the clause quoted, was not prejudicial to defendant on that ground. *R. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374.

(l-1) *Charge as to liability of carrier for injury to passenger either upon its car, or "upon the premises for the purpose of entering or leaving its vehicles."*

The error in charging that a carrier of passengers is liable to use the utmost skill and care to prevent injury to a passenger either upon its car or "upon the premises for the purpose of entering or leaving its vehicles," is immaterial, where it is undisputed that plaintiff was injured while on the car. *Buck v. R. Co.*, 6 N. Y. Supp. 524, 15 Daly 276, 25 St. Rep. 590.

(m-1) *Charge "that a railroad company is bound to carry passengers safely, so far as the utmost care and skill of the most prudent men practically obtainable can secure it," etc.*

It is not error to charge, "that a railroad company is bound to carry passengers safely, so far as the utmost care and skill of the most prudent men practically obtainable can secure it, under the particular circumstances of the case." *R. Co. v. Dailey*, 37 N. J. L. 526.

(n-1) *Instruction that carrier was liable, though delivery prevented by act of God or public enemies.*

In an action against a carrier for failure to deliver cattle shipped, error in instructing that the carrier was liable, though prevented from delivering by act of God or the public enemy, was harmless, where defendant claimed that the stock were in fact delivered, and did not defend on the ground that they had been lost through such causes. *Edwards v. Lee*, 147 Mo. App. 38, 126 S. W. 194.

(o-1) *Instruction limiting liability of carrier to that of bailee.*

A common carrier of household goods sued for loss of

goods by fire while in its custody as carrier may not complain of instructions limiting its liability to the liability of a bailee for hire, where the jury found that its negligence caused the loss, and where the uncontradicted evidence showed defendant's liability as a common carrier, whether it was negligent or not. *Collier v. Langan & Taylor Storage & Moving Co.*, 147 Mo. App. 700, 127 S. W. 435.

(p-1) *Erroneous charge on discovered peril.*

In an action against a railroad for personal injuries resulting from backing cars over plaintiff at a street crossing in a city, while he was attempting to cross its tracks, a charge on discovered peril was not prejudicial to defendant, though not warranted by the evidence, where, under the proof, the only mooted question of fact was, whether plaintiff was guilty of contributory negligence, and that was found in his favor by the jury. *Reed v. R. Co. (Mo.)*, 80 S. W. 919.

(q-1) *Instruction that it was the duty of both plaintiff and the conductor to exercise a high degree of care.*

Where, in an action against a street railway company for injuries caused by the gripman suddenly starting a car in which plaintiff was a passenger, after slowing it down to enable him to alight, the evidence shows that plaintiff signaled to the gripman to stop, and then left his seat and stood on the runningboard, an instruction that, after plaintiff signaled to the gripman, it was the duty of both him and the conductor to exercise a high degree of care to enable plaintiff to alight in safety, is harmless error, though the conductor was not signaled, there being no issue as to the conductor's negligence. *Grace v. R. Co.*, 156 Mo. 95, 56 S. W. 1121.

(r-1) *Conflicting instructions as to stock killed on railroad track.*

Where, in an action under Revised Statutes 1889, sec. 2611, to recover double damages for the killing of stock, the court gave an instruction conflicting, in that it did not negative the idea that the animal might have got on the track at a station; but the uncontradicted evidence showed that the place was not a public or private crossing, not within the switch or yard limits of a station, under sec. 2303; there was no ground for reversal on appeal by defendant. *Goodwin v. R. Co.*, 53 Mo. App. 9; *Lindsey v. R. Co.*, 53 Mo. App. 11.

(t-1) *Instruction overstating what constitutes one a passenger.*

In an action against a street car company for injuries to plaintiff while attempting to board a car by being caught between it and a railing parallel with the track across a viaduct, the court directed, that if plaintiff attempted to get on the car, and that he had a transfer entitling him to be carried as a passenger on that car when plaintiff attempted to board, the same was standing at the usual place to receive passengers, the plaintiff was a passenger of defendant. Held, that it was not necessary to have instructed with reference to the transfer, as a passenger intending to pay cash has the same right as one with a transfer, yet the error was not prejudicial. *Joyce v. R. Co.*, 219 Mo. 344, 118 S. W. 21.

(u-1) *Instruction based on supposition that defendant had negligently suffered the car to remain there a long time.*

Where, in an action against a railroad by an injured employee, who struck against a car on a side track, as he stood on the ladder of a car being switched, it ap-

peared that the yardmaster, in whose immediate supervision plaintiff was at work, was present and saw the situation, which was easy to correct, if dangerous, an instruction based on the supposition that defendant negligently permitted or suffered the car to remain there for a long period of time, where the evidence showed that it was for only a few hours, and car was to be soon moved, was harmless error, as there was no question as to defendant's knowledge of the danger and the time the car remained on the side-track did not render it more dangerous or more liable to produce the accident. *Redmond v. R. Co.*, 225 Mo. 721, 126 S. W. 159.

(v-1) *Where a switchman was injured by stepping into a ditch, charge that he assumed the risk if by the exercise of ordinary care he ought to have known it was there.*

Where a switchman, injured by stepping into a ditch in the yard while at work, admitted that he knew of the habit of the company to construct temporary ditches to drain the yard, and he had known of the existence of the ditches during the time he had worked in the yard, about two years, the error in a charge that he assumed the risk if, by the exercise of ordinary care he ought to have known that the ditch was there, was not prejudicial to him. *Wirtz v. R. Co.* (Tex. Civ. App.), 132 S. W. 510.

(w-1) *Court charging on injuries, that "there is some evidence and pleadings in regard to permanent injury."*

That the court in charging on permanent injuries said, that "there is some evidence and pleadings in regard to permanent injury," was not such expression of opinion as to be ground for reversal. *R. Co. v. Bradford* (Ga. Sup.), 69 S. E. 870.

- (x-1) *In action for wrongful ejection of passenger from street car, instruction that passenger was entitled to punitive damages.*

Where a passenger, 78 years old, is wrongfully ejected from a street car, and is compelled to walk nearly a mile, and is caused some delay in reaching his final destination, a verdict in his favor for \$100 is sustained, though the trial judge erred in instructing that the passenger was entitled to punitive damages, as the amount of the verdict shows that the erroneous instruction had no effect upon the jury. *Adams v. Traction Co.*, 41 Pa. Super. Ct. 403.

- (z-1) *Instruction that the law holds the carrier to the highest degree of care, as against its own "machinery and appliances," its cars and the operation of its road, etc.*

In an action for injuries to a passenger by an assault, in an endeavor to eject him from a carrier's station, an instruction that the law holds the carrier to the highest degree of care as against its own "machinery and appliances," its cars and the operation of its road by machinery and appliances, was not prejudicial to defendant as injecting other issues into the case. *Whitelock v. R. Co.* (Wash. Sup.), 109 P. 188.

- (a-2) *In a servant injury action, defendant can not complain of an instruction which submitted a view of the case not authorized by the evidence.*

In a servant's injury action defendant can not complain of an erroneous instruction which submitted a view of the case not authorized by evidence, and on such a view authorized them to find for defendant, if they believed defendant did not know, and reasonably could not have known that the servant was ignorant of the danger,

whereas the danger being one defendant was bound to assume plaintiff was ignorant of, and plaintiff being, in fact, ignorant of it, defendant was liable if it did not warn him of the danger, without reference to whether defendant knew, or could have known, of the servant's ignorance. *R. Co. v. Brandon* (Tex. Civ. App.), 126 S. W. 703.

(b-2) *Charge that if there was some projection on said car, on the platform or steps thereof, which caught in plaintiff's pants and caused his injury, etc.*

In an action against a carrier for injuries, plaintiff alleged that while alighting from one of defendant's cars, some projection on the step of the car caught the hem of plaintiff's pants, and he was thrown to the ground. The testimony indicated that the projection was on the car step. The court charged that if there was some projection on the platform or steps thereof which caught in plaintiff's pants and caused his injury, plaintiff could recover. Held, that there being no evidence that plaintiff was injured by any projection on the platform, including the platform in the instruction, if error, was harmless. *Judgm't*, 118 S. W. 783 affirmed; *R. Co. v. Chase* (Tex. Sup.), 126 S. W. 1109.

(c-2) *In action for injury to live stock, charge that if the jury found from the evidence that defendant's agent negligently switched the car so as to injure the horse, etc.*

In an action for injuries to live stock en route, the court instructed that, if the jury found from the evidence that defendant's agents, at C or elsewhere en route, negligently switched the stock car so as to injure the horses, it should find for the plaintiff. Held, that defendant was not prejudiced because the instruction was abstract on the subject of negligence elsewhere than at C, there being no evidence that defendant was negligent elsewhere, so

that the jury could not have so found. *R. Co. v. Dunn & Stewart* (Ark. Sup.), 127 S. W. 464.

(d-2) Charge that to find for plaintiff the jury must believe that the agent was personally liable in damages for injury to plaintiff's character.

Where, in an action for issuing, without probable cause and maliciously, a warrant to search plaintiff's premises for property alleged to have been stolen by him, the evidence showed that the agent of defendant procured the warrant by making the affidavit, the error in a charge that, to find for plaintiff the jury must believe that the agent was personally liable in damages to plaintiff for the injury to his character, because argumentative, was not reversible. *Gulsby v. R. Co.* (Ala. Sup.), 52 S. 392.

(e-2) In an action for assault by brakeman, instruction that it is the duty of the carrier to protect passengers from ill treatment by other passengers.

Reference in an instruction, in an action for assault on a passenger by a brakeman on a car, to the duty of a carrier to protect a passenger from ill treatment by other passengers, is harmless, the sole issue being whether the assault by the brakeman was wrongful and unprovoked. *R. Co. v. Dowgiallo* (Ark. Sup.), 101 S. W. 412.

(f-2) Instruction that jury should add whatever amount plaintiff would be entitled to for pain and suffering.

An instruction that the jury should add whatever amount plaintiff would be entitled to for damages, for pain and suffering, was not prejudicial to defendant, where it was clear, from the entire charge, that the court used the word "damages" to mean such damages as resulted from plaintiff's impaired and diminished earning capacity. *R. Co. v. Joyner*, 129 Ga. 683, 59 S. E. 902.

(g-2) *Instruction that if the front of the first car did not strike plaintiff he could not recover, but later struck out "first."*

In an action for injuries by being struck by a street car, plaintiff having been struck either by the first car or the trailer, an instruction was given that if the front of the first car did not strike plaintiff he could not recover, but the court afterward eliminated the word "first." None of the counts alleged that plaintiff was struck by the front of the car, and there was no positive allegation that there was only one car in the train, or that he was struck by the first car. Held that, while the instruction was improper, either with the word "first" inserted or omitted, it would not mislead the jury any more after it was modified than as originally drawn, defendant was not injured thereby. *Leighton v. R. Co.*, 235 Ill. 283, 85 N. E. 309; *O. S. Richardson Fuel Co. v. Seymour*, 235 Ill. 319, 85 N. E. 496.

(h-2) *Where plaintiff's leg was shortened as a result of injuries received, etc., failure of charge to submit to jury whether injuries were permanent.*

Where it was conclusively shown that plaintiff's leg was shortened as a result of the injuries received, and that her left hip was permanently injured, the failure of the charge to submit directly to the jury the question as to whether plaintiff sustained permanent injury is immaterial. *R. Co. v. Hawkins* (Tex. Civ. App.), 108 S. W. 736.

(i-2) *Instruction that as decedent was deaf there could be no recovery because of failure to sound the whistle or ring the bell.*

In an action for the death of a traveler struck by a train at a public crossing, where the evidence did not show that defendant's negligence was the proximate

cause of the accident, the error in an instruction that, as decedent was deaf, there could be no recovery because of the failure to sound the whistle or ring the bell on the approach of the train, was not prejudicial. *Hummer's Ex'x v. R. Co.*, 32 Ky. L. R. 1315, 108 S. W. 885.

(j-2) *In action for death by dynamite explosion, instruction that unless employees shoved a car against the car of dynamite so violently as to cause an explosion plaintiff could not recover.*

Railway companies sued for death caused by an explosion of dynamite can not complain of an instruction that unless their employees shoved a car against the car of dynamite with such unusual violence and recklessness as to cause the explosion, plaintiff could not recover, since the instruction ignored the company's liability for negligence in leaving the car in the yard for eleven to twelve hours unguarded and without warning. *R. Co. v. Adkins's Adm'r* (Ky. Ct. App.), 117 S. W. 321, judgment mod., motion for rehearing and oral arg. denied, 119 S. W. 820.

(k-2) *In action for injuries to goods in transit, instruction that defendant would not be liable for any damage while goods were stored in its warehouse before shipment.*

In an action for injuries to goods in transit, instruction not within the issues, that defendant would not be liable for any damages which occurred while the goods were stored in its warehouse prior to shipment, while erroneous, would not constitute reversible error. *Connelly v. R. Co.*, 133 Mo. App. 310, 113 S. W. 233.

(l-2) *Court referring in its instructions, to one of the contentions of defendant as the "real contention."*

The reference by the court, in its instructions, to one of the contentions of defendant as the "real contention"

was harmless error. *R. Co. v. Cotter*, 132 Ga. 461, 64 S. E. 474.

(m-2) *In an action for killing horses, instruction permitting recovery by proof that the fence or gates were insufficient to prevent the horses from going on the tracks.*

An instruction in an action against a railroad for killing horses at a point at which its right of way was required to be fenced, permitting plaintiff to recover by proof that the fence or gates were insufficient to prevent the horses from going upon the track, and that the horses were killed, was not prejudicial, where the undisputed evidence showed that the horses went upon the track at the defective gate. *Fee v. R. Co.*, 83 Neb. 307, 119 N. W. 447.

(n-2) *Instruction authorizing a recovery if the injury was caused either by the starting of the car or by the defective step.*

Where the plaintiff charged that by reason both of the starting of the car and the defective step, she was thrown and her foot inserted in the opening in the step, whereby she was injured, and the proofs were submitted in support of this theory, error in an instruction authorizing a verdict for plaintiff if the injury was caused either by the starting of the car or by the defective step was harmless, where the jury made a special finding that the car moved while plaintiff was boarding it and before she fell on the platform, this showing that they were not misled by the erroneous instruction. *Corcoran v. Albuquerque Traction Co.* (N. M. Sup.), 103 P. 645.

(o-2) *Error in charge from adding freight charges to damages.*

Since a stipulation in the bill of lading that the amount

of damage for which the carrier would be liable should be computed on the property's value at the time and place of shipment, including reasonable freight charges by the consignee, error in an instruction in permitting recovery of the value of the goods at destination, instead of at place of shipment, was harmless, where the only element of value there was the freight charges paid by the consignee. *Kelly v. R. Co.*, 84 S. C. 249, 66 S. E. 198.

(p-2) *Instruction requiring jury to find that the master's foreman suddenly applying compressed air to derrick was negligence, etc.*

In an action for injuries to a servant from a sudden application of compressed air to a derrick, causing it to jerk the servant into the air, a charge requiring the jury to find that the master's foreman who applied the air was negligent, and also, that he could, by the exercise of ordinary care, have prevented injury after the air was turned on, before they could find for the plaintiff, whereas negligence in either particular would support a verdict, was not erroneous as to defendant. *Judg. Tex. Civ. App.* 118 S. W. 1150, *affm'd*, *R. Co. v. Johnson*, 127 S. W. 539.

(q-2) *Erroneously referring to one, not a passenger, as a trespasser.*

In an action against a railroad company for a death of one on its car, who was not a passenger, where no intentional negligence was shown, an instruction that deceased was a mere trespasser was harmless. *McCauley v. R. Co.*, 93 Ala. 356, 9 S. 611.

(r-2) *In an action for injuries, instruction authorizing verdict for defendant, although negligent, if the other's was the "main controlling" cause.*

Where, in a passenger's action against two railroads

for injuries from a collision, the evidence authorized a verdict against one and for the other, an erroneous instruction authorizing a verdict for one defendant, although guilty of negligence, if the other's negligence was the "main controlling" preponderating cause of the injury; held, not prejudicial to the defendant found liable. *R. Co. v. Williams*, 140 Ga. 862, 80 S. E. 321.

(s-2) *Instruction requiring the carrier to protect passengers from mistreatment by employees.*

In an action for wrongful ejection of a street railway passenger, an instruction requiring the carrier to protect passengers from mistreatment by employees, held not prejudicial to defendant because of indefiniteness in referring to "mistreatment." *R. Co. v. Bracy* (Ark. Sup.), 165 S. W. 450.

(t-2) *In action against a railroad for flooding lands, instruction using the words, "sufficient openings or culverts."*

One, in constructing a railroad, having no right to injure the lands of an upper proprietor by flooding them with surface water which had naturally passed over the right of way where, by reasonable care, it might consistently with the enjoyment of the right of way leave free passage for the water, the use of the words, "sufficient openings or culverts," in an instruction, that it was the duty of defendant in building its road to use ordinary care to provide proper and sufficient openings or culverts for the escape of all water crossing its roadbed by natural drains or depressions so as not to obstruct and cause the water to overflow the lands of upper proprietors which, by the exercise of such care, could have been foreseen and guarded against, was not prejudicial, as a free passage of water could not be otherwise provided.

Ames Shovel & Tool Co. v. Anderson (Ark. Sup.), 118 S. W. 1013; O'Mara v. Jansma (Iowa Sup.), 121 N. W. 518.

(u-2) *Instruction that if plaintiff saw the car approaching and stepped to a place of safety, and then in front of car, and it could not be stopped, etc.*

While plaintiff, an employee of defendant, while sweeping the track was struck by a car, an instruction that if plaintiff saw the car approaching, and stepped to a place of safety, and then stepped towards the track and in front of the car, and the car could not be stopped, by the exercise of ordinary care, in time to avoid striking the plaintiff, then defendant should be found not guilty, though subject to criticism, is not reversible error. Dahms v. Sampsell. 178 Ill. App. 644.

(v-2) *Instruction that the jury should use the "Carlisle Tables" to determine plaintiff's age, instead of the "probable duration of his life."*

An instruction that the jury should use the "Carlisle Tables" to determine plaintiff's "age," instead of the "probable duration of his life," held harmless, though the jury may not have understood the court's meaning. R. Co. v. Woodall (Ga. App.), 78 S. E. 781.

(w-2) *Instruction that the law will not "tolerate any negligence on the part of said carrier," and failing to limit to that charged in the complaint.*

An instruction that the law will not "tolerate any negligence on the part of said carrier," although it failed to limit the negligence to that charged in the complaint was harmless, where other instructions stated the proof required to find for plaintiff, and the jury found that the defendant was negligent as charged in the complaint. R. Co. v. Adams (Ind. App.), 100 N. E. 773.

- (x-2) *Instruction, in an action for injuries, that plaintiff must show, in order to recover, that she had recovered from injuries received in a former accident.*

An instruction, in an action for personal injury, that plaintiff must show that she had recovered from injuries received in a former accident to recover damages; held erroneous, as against plaintiff but favorable to defendant. *R. Co. v. Holsclaw* (Ind. App.), 101 N. E. 750.

- (y-2) *Instruction that a street railway company was required to use that high degree of care "usually" exercised by very cautious and prudent persons under similar circumstances.*

Error in an instruction that a street railway company was required to use that high degree of care "usually" exercised by very cautious and prudent persons under similar circumstances; held, not ground for reversal. *Walker v. R. Co.* (Tex. Civ. App.), 151 S. W. 1142.

- (z-2) *Instruction as to the invalidity of the exemption from liability clause of a railroad pass.*

An instruction as to the invalidity of the exemption clause of railroad pass, which was based upon a certain statute, if erroneous, held harmless, where the exemption clause was invalid in any case. *Gill v. R. Co.*, 135 N. Y. Supp. 355, 151 App. Div. 131; motion for leave to appeal to Court of Appeals denied, 136 N. Y. Supp. 1135.

- (b-3) *In an action for injuries in a collision at a crossing, failure to connect stated omission with the injury, in instruction given.*

In an instruction, in an action for injuries in a collision with a train at a crossing, that the company had the right to occupy the streets with its tracks and to run its trains over them, but that the right was not exclusive, and that the running of the train at high speed over a

crossing, without giving reasonable warning of the approach by ringing the bell or sounding the whistle, made the company liable to a traveler, if injured without any contributory negligence while lawfully using the crossing, the error in failing to connect the said omissions with the injury was harmless, for the jury must have understood that the court referred to injuries sustained as a proximate result of the omission specified. *R. Co. v. Moore* (Ind. App.), 97 N. E. 203.

(c-3) *In action for death by street car, instruction that if intestate could have seen the car by the exercise of ordinary care, then the jury should find for defendant, etc.*

In an action against a street car company for causing the death of plaintiff's intestate, the court charged that if the jury find from the evidence that the intestate could have seen the car, and would have seen it in the exercise of ordinary care, then they should find for the defendant, unless they further find that he had reason to believe that he had sufficient time to clear the track before the car reached the place where he was attempting to cross. Held that, although no issue of contributory negligence was tendered by the pleadings, the charge was harmless, as it was warranted by the evidence. *Traction Co. v. Dorenkemper*, 31 Ohio Cir. Ct. R. 11.

(d-3) *Where growing crops were destroyed by flooding, instruction that the market value thereof is the measure of damages.*

Where growing, immature crops are totally destroyed by flooding, an instruction that the market value of crops damaged or destroyed is the measure of damages, though erroneous, is not prejudicial to defendant, when the evidence is conclusive that the crops were totally destroyed, and had no market value, and the reasonable

value is clearly shown. *Boyd v. R. Co.* (Neb. Sup.), 132 N. W. 529.

(c-3) *Instruction that if defendant's engineer saw the team in time to have stopped the train and avoided the injury, defendant was liable.*

Where plaintiff left his team and wagon so close to a railroad track that they were injured by a passing train, an instruction that if defendant's engineer observed the team in time to have stopped the train and avoided the injury, defendant was liable, though erroneous as embodying an element that defendant would be liable if the engineer could have observed the team by the exercise of ordinary care, was not ground for reversal, where the undisputed evidence showed that the engineer observed the team at a sufficient distance to have stopped the train, with the exercise of ordinary care, and the verdict for defendant was predicated on plaintiff's contributory negligence. *Geren v. R. Co.* (Ark. Sup.), 137 S. W. 1100.

(f-3) *Where an oiler was injured, charge that if plaintiff was "entirely familiar with the mechanism of the engine," and if he "necessarily would have seen," etc., verdict should be for defendant.*

Where an oiler was injured in oiling a stationary engine in the dark, and the controlling issue was, whether or not he was guilty of contributory negligence in failing to discover that the engine was running, a charge that if plaintiff was "entirely familiar with the mechanism of the engine," and if he "necessarily would have seen, if he had looked or heard if he had listened." the verdict should be for the defendant, was not erroneous for, while the defendant might be entitled to a verdict on other facts, it was entitled to a verdict on these, and was not harmed because they were submitted conjunctively. *R. Co. v. Branham* (Tex. Civ. App.), 137 S. W. 403.

- (g-3) *In action for injuries, instruction that if jury found for plaintiff they should assess his damages "at such sum not exceeding \$25,000 as they might believe from the evidence he sustained."*

Where, in an action for injuries, plaintiff claims damages in the sum of \$25,000, an instruction that if the jury found for plaintiff they should assess his damages "at such sum, not exceeding \$25,000, as they might believe from the evidence that he had sustained, while objectionable as tending to mislead the jury to believe that their finding for the full amount would meet the court's approval, was not reversible error. *Stid v. R. Co.*, 139 S. W. 172 (Mo. Sup.).

- (h-3) *In action for injuries at a crossing, charge that trainmen seeing that a team on a highway approaching the crossing is beyond control, must do all they can to prevent injury.*

Where, in an action for injuries at a crossing, the undisputed evidence showed that the trainmen, on seeing the traveler approaching the crossing, applied the machinery brakes, and did all they could to stop the train and prevent the collision, the error in the charge that trainmen who see that the team of a traveler on a highway approaching the crossing is beyond his control, must do all they can to stop the train to prevent injury, was not prejudicial. *Lee v. R. Co.*, 89 S. C. 274, 71 S. E. 840.

- (i-3) *In action for wrongful death, instruction referring to statutory penalty with reference to engineers at railroad crossings.*

An instruction, in an action by an administrator for wrongful death of his decedent upon defendant's railroad crossing, which refers to a statutory penalty, with reference to engineers at railroad crossings, which feature

of the instruction was not afterwards referred to, or emphasized, and where the record did not indicate that it, in any manner, influenced the jury as against the defendant, is harmless. *R. Co. v. Lander* (Ind. App.), 95 N. E. 319.

(j-3) *In action for injuries at railroad crossing, instruction not specifically covering loss of earnings during minority.*

Notwithstanding an instruction, in an action for injuries at a railroad crossing, is broad enough to have entitled to an award upon the question of loss of earning capacity by a minor during minority, yet such instruction will not reverse if the parents of such minor have individually participated in the prosecution of the action, as thereby such parents estop themselves from recovering damages upon their own accounts. *Ballentine v. R. Co.*, 157 Ill. App. 295.

(k-3) *In action against street railway company for injuries, instruction that the fact of any witness being in the employ of either party may be considered, etc.*

In an action against a street railroad company for personal injury, the court instructed that the fact that any witness is or has been in the employ of either party, as well as the relations which existed between any witness and either party, and any interest a witness may have in the result of the suit, so far as the same may be shown by the evidence, may be considered by the jury in determining the weight which should be given to the testimony of such witnesses, taking the same in connection with all the other evidence in the case and the facts and circumstances proven. Held that, while this instruction does not clearly limit the consideration of the fact of employment to those occasions in which such interest is shown, error is harmless, in view of the fact that the

only employees of defendant who testified, were those in charge of the car. *Busateri v. R. Co.*, 156 Ill. App. 578.

Sec. 238. Instructions refused.

- (a) *In an action for the death of a car repairer, it was not error to refuse to submit whether or not deceased placed a signal on the track or cars before he went to work.*

In an action for the death of a car repairer, defendant's request to submit, as a part of a special verdict, a direct inquiry as to whether or not deceased placed a signal on the track or cars before he went to work, and whether or not one was in place when the switching crew switched cars on the track, was rejected; but the court submitted the general question of contributory negligence, and instructed the jury that an affirmative answer thereto depended on whether or not there was a warning signal on the track or cars. Held, that the verdict covered the specific issues of fact embraced in the requested questions, and there was no error in refusing to submit them. *Steber v. R. Co.* (Wis. Sup.), 120 N. W. 502.

- (b) *In action for injuries to person on track, refusal to charge that plaintiff was a trespasser.*

In an action against a railroad for injuries to a person on the track, the refusal to charge that plaintiff was a trespasser, and those in charge of the train owed him no duty at all, until they discovered his peril, was not prejudicial, where it appeared that the engineer saw the plaintiff, when he was more than 200 yards ahead of the train, and no warning was given. *R. Co. v. Dalton* (Ky. Ct. App.), 113 S. W. 842.

- (d) *Refusal to charge in regard to equipment with brake and application thereof to avert a collision.*

Where, in an action against a railroad by an employee

for injuries received in a collision, the jury found that the application of the brake on the train where the plaintiff was riding would not have stopped the train in time to prevent the accident, the refusal of a charge that if the car in which plaintiff was riding was equipped with a brake, by the use of which plaintiff, or a brakeman under his direction, could have checked the speed or stopped the train, and that such brake was not applied, and in consequence a collision resulted causing his injury, plaintiff could not recover, was harmless. R. Co. v. Collins, 168 Ind. 467, 80 N. E. 415.

(e) *Refusal to charge that first duty of engineer was safety to passengers rendered unnecessary by finding he could have stopped the train in time to avoid the killing.*

Refusal to charge, in an action for loss of cattle killed and injured at a railroad crossing, that the first duty of an engineer was with respect to the passengers in his charge, and his duty to prevent a collision only secondary, was immaterial, where the jury found that the engineer could have stopped the train after he first saw the cattle before reaching the crossing. R. Co. v. Lee, 66 Kan. 806, 72 P. 266.

(f) *Refusal to charge as to passenger boarding a street-car.*

Where the court instructed that if plaintiff offered himself as a street-car passenger, when the car stopped for passengers, and defendant did not permit the car to remain standing sufficiently long to allow him to board it, and while so in the act of boarding it, the car was negligently started, and he was injured, he could recover, it was not prejudicial error to refuse a requested instruction that, if the car stopped at the usual place, and while it was standing plaintiff attempted to board it as a pas-

senger, defendant was bound to exercise the utmost care for his safety that a prudent man would have exercised under the circumstances. *Quinn v. R. Co.*, 218 Mo. 545, 118 S. W. 46.

(g) *Refusal to charge as to the market value of stock killed on railroad.*

In an action against a railroad company for killing stock, the jury fixed the damages at \$200, the value of the stock ascertained by the witnesses other than the plaintiff, without reference to any peculiar or particular value; held, that it was not prejudicial error to refuse defendant's request for a charge that, while the measure of damages is the value of the stock when killed, that value is the market value of such stock, and not some peculiar or particular value attached to it by the plaintiff. *Bullington v. R. Co.*, 32 W. Va. 436, 9 S. E. 876.

(h) *In action for personal injuries, refusal to charge that no allowance was to be made for money alleged to have been paid for medicines or medical attention.*

In an action against a street railroad company for personal injuries, where the court, in charging the jury, limited plaintiff's recovery to reasonable compensation for her pain and suffering caused by the injury, the refusal to charge that no allowance was to be made for money alleged to have been paid or obligation incurred for medicine or medical attention, was harmless error. *Dent v. Traction Co.* (Mo. App.), 129 S. W. 1044, 145 Mo. App. 61.

(i) *Refusal to charge that if plaintiff, while alighting, was interfered with by a passenger boarding the train, which caused the injury he could not recover.*

Where, in an action for injuries to a passenger in alighting from a train, the court correctly defined prox-

imate cause, and charged that unless defendant was negligent as charged, and plaintiff's fall was proximately caused by the negligence of defendant's employees, plaintiff could not recover, and that plaintiff's injury must be the direct and proximate result of defendant's failure to stop the train a reasonably sufficient length of time, defendant was not prejudiced by the refusal to charge that if plaintiff while alighting, was interfered with by a passenger boarding the train, and that such interference was the cause of plaintiff's fall, he could not recover. *R. Co. v. Bryant* (Tex. Civ. App.), 103 S. W. 237.

(j) *In action for wrongful ejection of passenger who paid fare, error in refusing to instruct that no recovery could be had for sum paid.*

Where, in an action for the wrongful ejection of a passenger, plaintiff alleged that he paid \$21.50 for railroad fare to a certain point, but the evidence showed that he paid that amount for fare to another point, the error in refusing to instruct that no recovery could be had for the sum paid, did not require the reversal of the judgment for plaintiff, provided he remitted that sum. *R. Co. v. Lightfoot* (Tex. Civ. App.), 106 S. W. 395.

(k) *In action for injuries from defective highway crossing, refusal of charge that jury should not allow plaintiff damages, except for those shown by a preponderance of the evidence.*

In an action against a railroad company for injuries to plaintiff through a defective highway crossing, the refusal of a charge that the jury should not allow plaintiff damages for any injury alleged in his petition, except such as were shown by a preponderance of the evidence, was not reversible error, the court charging that plaintiff had the burden of making out his case by a preponderance of the evidence, and that the jury were required

“to believe from the evidence” the existence of every fact necessary to his recovery, and it being shown that serious injuries were sustained by plaintiff, and there is no claim that the verdict is excessive. *R. Co. v. Smith* (Tex. Civ. App.), 107 S. W. 638.

(l) *In action for personal injuries, refusal of proper instruction, that if jury find plaintiff not entitled to recover, they will not consider alleged injuries.*

In an action to recover for personal injuries, an instruction that if the jury find that the plaintiff is not entitled to recover, then they will not have occasion to take into consideration the character or extent of the plaintiff's alleged injuries, whether serious or slight, is approved, but refusal to give it is harmless error. *R. Co. v. Foster*, 128 Ill. App. 571, judgm't affm'd, 226 Ill. 288, 80 N. E. 762; *R. Co. v. Hagenbeck*, 228 Ill. 290, 81 N. E. 1014.

(m) *Refusal of instruction that if jury found the converse of the facts entitling plaintiff to recover, they should find for defendant.*

The refusal of an instruction that in case the jury found the converse of the facts on which plaintiff's right to recover was made to depend, they should find for the defendant, was not reversible error, where the instruction, if given, would not probably have affected the verdict. *R. Co. v. Wiley* (Tex. Civ. App.), 155 S. W. 356.

(n) *Refusal of instruction that, as the crossing was especially dangerous, it was decedent's duty to exercise increased care commensurate with the danger.*

Where the jury had before them all the facts, and found that intestate as she approached a crossing where she was killed in a collision with an electric car, exercised such care as might reasonably be expected of a

person of ordinary prudence, defendant was not injured by the refusal of an instruction that, as the crossing was especially dangerous, it was her duty to exercise increased care commensurate with the danger. *Traction Co. v. Glass's Adm'r*, 144 Ky. 279, 137 S. W. 1054.

Sec. 239. Conspiracy.

- (a) *Subsequent evidence of conspiracy rendered previous evidence competent.*

Where the admission of certain evidence was erroneous, because it depended on a conspiracy, and there was at the time it was admitted no showing of a conspiracy, the error was cured if evidence tending to prove the conspiracy was afterwards introduced. *Benjamin v. McElwaine-Richards Co.*, 10 Ind. App. 76, 37 N. E. 362.

- (b) *Admitting declaration of co-conspirator before prima facie case was made out.*

It is certainly the better practice to require at least a prima facie case to be made out before admitting declarations of co-conspirators. But this is a matter within the discretion of the court below, and unless the reviewing court can clearly establish that such discretion has been abused to the injury of the defendant, it should not hold it to be reversible error. *Sweat v. Rogers*, 6 Heiskel (62 Tenn.) 117.

- (c) *Where book agent is tried for conspiracy, asking defendant and his witnesses whether the profit in de luxe book business did not lie in dealing with suckers, etc.*

Where a book agent is tried for conspiracy in obtaining money from a patron by false pretenses and by the confidence game, permitting the asking of defendant and his witnesses whether the profit in the de luxe book

business did not lie in dealing with suckers, whether an agent had not procured a contract when the man was drunk, whether a citizen had not cautioned another about joining "the flatiron gang," and whether the defendant had not been engaged in a prior fraudulent deal, is not prejudicial error, where objections to such of such questions as were irrelevant were sustained. *People v. Warfield*, 172 Ill. App. 1.

(d) *Instruction cured improper evidence as to conspiracy.*

Though it is error to admit in evidence the acts and declarations of some of the alleged co-conspirators made in furtherance of the project, in the absence of others, without sufficient evidence found previously introduced to establish a prima facie case of conspiracy, the error is cured by an instruction that, as there was no evidence to prove a conspiracy, no consideration should be given to that part of the complaint charging conspiracy. *Moore v. Shields*, 121 Ind. 267, 23 N. E. 89.

(e) *Charge on conspiracy which was not alleged in the petition.*

Where an instruction authorizing a recovery by the plaintiffs for damages for trespass, in case the jury found that the defendant and others had entered into a conspiracy to forcibly and unlawfully deprive and dispossess the plaintiffs from their peaceable possession of real estate was given, and the petition upon which the case was tried did not charge a conspiracy, is not reversible error, when all the elements necessary to entitle the plaintiffs to recover exist in such case independently of any conspiracy, and plaintiffs' recovery was not made more easy on account of such instructions, or the damages increased thereby, no injury was done to the defendant. *Okl. City v. Hill*, 6 Okl. 114, 50 P. 242.

- (f) *Striking unnecessary charge of conspiracy from complaint.*

An order striking from a complaint an allegation of conspiracy is harmless, where such allegation was not essential to plaintiff's right of recovery. *Woodruff v. Schneider*, 65 How. Pr. (N. Y.) 450.

Sec. 240. Conversion.

- (a) *In action of trover, receiving evidence of the value of the goods several months before the alleged conversion.*

In an action of trover, evidence of the value of the goods several months before the alleged conversion was first offered and received, and afterwards other evidence as to such value at the time of the alleged conversion was given, by which the jury were governed; semble, that in receiving as evidence the value, there was no error which can be ground for reversal. *Thatcher v. Kaucher*, 2 Col. 698.

- (b) *In action by a mortgagor against a mortgagee to recover for conversion by the latter of mortgaged property, permitting plaintiff to testify as to the value of property, without showing his acquaintance therewith.*

In an action by a chattel mortgagor against a mortgagee to recover for the unlawful conversion by the latter of the mortgaged property, error, if any, in permitting plaintiff to testify as to the value of the property, without showing that he is acquainted with the market value of the property, consisting of plaintiff's household furniture and other chattels which he purchased, owned and used, is harmless, where the answer admits the taking of the property, and sale thereof, under the mortgage, for an amount in excess of the damages

recovered by plaintiff. *Sills v. Hawes*, 14 Col. App. 157, 59 P. 422.

(c) *In action for conversion, instruction that if defendants did such acts they were trespassers and were liable to plaintiff.*

Error in an action for conversion, where plaintiff claimed damages for malicious acts of defendant in tearing down his fences to obtain access to the property, in an instruction that if defendants did such acts they were trespassers and were liable therefor to plaintiff, is harmless, where the special verdict awarded no damages for trespass. *Lothrop v. Golden* (Cal.), 57 P. 394.

(d) *In action for conversion, instruction that the jury might allow plaintiff the cost and expenses incurred, not including counsel fees.*

Where, in an action for conversion, there was no direct evidence that plaintiff expended anything except time and car-fare, the amount of which was not shown in regaining the possession of the part of the goods converted, an instruction that the jury might allow to the plaintiff the costs and expenses, if any, which she had incurred, not including counsel fees, in obtaining the possession of such articles, was not prejudicial to defendant, as misleading and unsupported by the evidence, it being presumed that the jury allowed only such expenses as had been incurred and proved. *Pennington v. Redman Van & Storage Co.* (Utah Sup.), 97 P. 115.

Sec. 241. Damages.

(a) *Failure to submit to jury to find only nominal damages.*

Where, in an action to recover for the conversion of personal property, there is a mortgage to the full value of the property, while it would have been proper to sub-

mit the case to the jury, with instructions, in finding for plaintiff, to assess nominal damages only, the omission to do so is harmless error. *Bank v. Jenks*, 6 Dak. 432, 43 N. W. 947.

(b) *Verdict for nominal damages cured error in charge as to that question.*

A charge that the jury, in estimating the damages, should consider plaintiff's reputation, if erroneous, because the publication by defendant, is harmless, where only nominal damages are given. *Wilcox v. Moon*, 61 Vt. 484, 17 A. 742.

(c) *Error in instructing for exemplary damages cured by award of compensatory damages.*

It is not ground for reversal that an instruction permitted the error of exemplary damages, where it is clear that compensatory damages only have been given. *Kennedy v. Sullivan*, 84 Ill. App. 46; *Hoard v. Peck*, 56 Barb. (N. Y.) 202; *Love v. Love*, 98 Mo. App. 562, 73 S. W. 255; *Wright v. Donnell*, 34 Texas 291; *Fitzpatrick v. Blocker*, 23 Texas 551.

(d) *Instructions favorable to defendant and damages less than jury ought to have found.*

A judgment will not be reversed at the instance of the defendant, because of an instruction which permitted the jury to find a smaller sum in damages than they ought, if they found anything, the error being in his favor. *Wuhlheim v. Foster*, 41 Ill. App. 458; *Howe v. Cochran*, 47 Minn. 403, 50 N. W. 368; *Howard v. Lillard*, 17 Mo. App. 228; *Sonner v. St. Louis Transit Co.*, 102 Mo. App. 271, 76 S. W. 691; *Hutchinson v. R. Co.*, 88 Mo. App. 376; *Noll v. St. Louis Transit Co.*, 100 Mo. App. 367, 73 S. W. 907.

- (e) *Error in instruction as to rule of damages harmless when verdict is not excessive.*

An instruction improperly enlarging the rule of damages may be regarded as harmless, and is not ground of error where the verdict is within limits, and is not complained of as excessive. *R. Co. v. Odum*, 52 Ill. App. 419; *R. Co. v. Mosely*, 6 Ind. Ter. 369, 98 S. W. 129; *R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312; *Abbitt v. St. Louis Transit Co.*, 106 Mo. App. 640, 81 S. W. 484; *Lambert v. Hartshorne*, 55 Mo. 549.

- (f) *Erroneous instructions on exemplary damages where plaintiff not entitled to actual.*

Where instructions were given as to the right of plaintiff to recover exemplary damages, which were claimed to be wrong; held that, as under the circumstances plaintiff was not entitled to actual damages, the instruction was, if erroneous, error without prejudice. *Myers v. Wright*, 44 Iowa 38.

- (g) *Erroneous instruction authorizing exemplary damages, where jury found damages for maliciously taking the property.*

In an action for conversion, an erroneous instruction authorizing the jury to award exemplary damages if the taking was unlawful, is not reversible error where the jury found damages for maliciously taking the property. *Lothrop v. Golden*, 57 P. 394 (Cal. Sup.).

- (h) *Refusal of proper instructions upon damages, where amount awarded is fully sustained by the evidence.*

The refusal by the court of a proper instruction upon the question of damages will not be reversed if the amount awarded is fully sustained by the evidence. *Voudrie v. R. Co.*, 155 Ill. App. 279.

- (i) *Error in admitting items of damage not claimed in the petition, too insignificant to injure appellant.*

Although the court may have erred in admitting evidence as to items of damage not claimed by the petition, yet, as these items were so small as to amount to nothing, and the damages assessed can be accounted for, without any reference to them, the presumption should be indulged that nothing was allowed on that account. *R. Co. v. Finer*, 11 Ky. L. R. (abst.) 260.

- (j) *Error in allowing plaintiff to estimate the damages he sustained.*

Plaintiff shipped a car of stock over defendant's road, billed to the National Stock Yards, East St. Louis, but defendant carried them to commission firm, and the stock was sold by such commission firm and return was made to plaintiff of the proceeds. Plaintiff brought action against the defendant to recover the loss sustained because of selling them at the place to which they were not billed. Plaintiff testified in the action as to the price for which stock of a similar kind were sold in East St. Louis on the day on which they should have been delivered at that place, and also what he received for them at the place to which defendant delivered them. Held, that allowing the plaintiff to further state his estimate of the damages which he sustained was not prejudicial error. *Tandy v. R. Co.*, 68 Mo. App. 431..

- (k) *In action for damages from dog-bite, admission of certified copy of municipal court records showing defendant had been fined for allowing dog, etc.*

In an action for damages from a dog-bite, admission of a certified copy of municipal court records showing that defendant had been fined for permitting his dog to run at large unmuzzled; held, not prejudicial error. *Ciecriski v. Hermanski*, 182 Ill. App. 113.

- (l) *Evidence of non-expert witness as to damage to furniture from leaking water main.*

In an action for damages to plaintiff's dwelling and furniture by a leaking water main, the admission of evidence as to the damage to furniture, over objection that witness did not qualify as an expert, is not reversible error, where the jury allowed only an amount within the damage suffered, as shown from the unquestioned evidence. *Damman v. City of St. Louis*, 152 Mo. 186, 53 S. W. 932.

- (m) *Error in admission or rejection of evidence immaterial, when damages greater than awarded by jury.*

Errors in the admission or rejection of evidence are immaterial, if the uncontradicted evidence shows a liability for resulting damages which are greater than that allowed by the jury. *Cincinnati v. Roettinger*, 11 O. C. C. n. s. 501, 21 O. C. D. 252.

- (n) *Admission of improper element of damages, damages not being claimed on that ground, and award not excessive.*

A judgment will not be reversed because of the admission of evidence in proof of an improper element of damages, where damages on that ground were not claimed at the trial, and the damages awarded are not excessive, in view of other elements alleging proof. *R. Co. v. Richards*, 40 Ill. App. 560.

- (o) *Excluding evidence of damages sustained by appellant, where the verdict was against him.*

Excluding evidence as to damage sustained by appellant is harmless, where the verdict was against him. *Thompson v. Schuster*, 4 Dak. 163, 28 N. W. 858; *Poland v. Bownell*, 131 Mass. 138, 30 N. W. 189; *Eaton v. Wooly*, 28 Wis. 28.

(p) *Improper testimony tending to enhance damages, where tried by the court as a jury.*

In an action for the breach of a contract entered into in Tennessee, whereby plaintiff went to Missouri for the purpose of performing his part of the contract, and was prevented from so doing by defendant's breach, the court, against the objections of defendant, permitted plaintiff to prove that he had expended a sum of money in bringing his brother to Missouri from Tennessee, to assist in the performance of the contract. The court, sitting as a jury, did not allow any damages based on such testimony. Held, that the error in admitting the evidence was harmless. *Moore v. Mountcastle*, 72 Mo. 605; *Torpey v. City of Independence*, 24 Mo. App. 288.

(q) *In an action for damages by surface water, defendant not prejudiced by evidence of other obstructions.*

In an action for damages by surface water defendant held not prejudiced by evidence as to other obstructions than defendant's embankment. *Cox v. Odell* (Cal. App.), 82 P. 1086.

(r) *Incompetent evidence that could not have enhanced the damages awarded.*

If any incompetent evidence is admitted upon the ground of damages, a reversal will not be ordered, if it does not appear that the consideration of such evidence could have enhanced the verdict. *Kunkel v. Chicago Consol. Traction Co.*, 156 Ill. App. 393.

(s) *In action for damages from overflow, admitting proof that culverts and trestles had been put in roadway since the injury.*

In an action for damages to crops by improper construction of a railway track, which resulted in impounding water on plaintiff's land, any error in admitting proof

that culverts and trestles had been put in the roadway since the injury was harmless, where the proof was clear and uncontroverted that the failure to have them at the time in question resulted in the damages complained of. *R. Co. v. Taylor* (Tex. Civ. App.), 135 S. W. 1076.

(t) *Immaterial and incompetent evidence of damages where plaintiff not entitled to recover.*

The admission of immaterial and incompetent evidence offered by defendant will be disregarded upon plaintiff's appeal, where it related only to the question of damages, and the court has properly held that plaintiff was not entitled to recover at all. *Kennedy v. M. H. & F. Traction Co.*, 178 N. Y. 508, affm'g 77 App. Div. 484, 78 N. Y. Supp. 937, 12 Am. Cas. 180.

(u) *Where the proper rule of damages is charged by the court, appellate court will not reverse for unprejudicial, incompetent and irrelevant evidence.*

Where the judge lays down the proper rule of damages, the appellate court will not reverse for failure to exclude evidence which was incompetent and irrelevant, when it is apparent from the verdict that appellant was not harmed. *Jerabek v. Kennedy*, 61 Neb. 349, 85 N. W. 279; *Hipp v. R. Co.*, 50 S. C. 129, 27 S. E. 623.

(v) *Improper evidence as to damages in libel case.*

The admission of improper evidence in an action for libel, bearing on the question of actual damages, was not prejudicial to defendant, where the jury allowed only nominal actual damages. *Ferguson v. Evening Chronicle Pub. Co.*, 72 Mo. App. 462.

(w) *Erroneous evidence on issue of damages, where amount recovered amply justified.*

Where there was ample legal evidence to justify the

amount awarded as damages, and plaintiff was entitled to recover under the conceded facts, the admission of erroneous evidence on the issue of damages was harmless. *Myers v. Diamond Joe Line*, 58 Mo. App. 199; *Muldrow v. R. Co.*, 62 Mo. App. 431.

(x) *Immaterial evidence of contract between defendant railroad and another as to liability for damages.*

In an action against a railroad company, operating a connecting line from the depot to certain cattle yards, for injuries to a passenger, the admission in evidence of a contract between defendant and another railroad, which provided that defendant should be liable for damages on account of the negligence of its employees while performing any service under the contract, etc., although such testimony was immaterial, and had no bearing whatever on the case, was not prejudicial. *Fleming v. K. C. Sub. Belt R. Co.*, 89 Mo. App. 129.

(y) *In action for damages from overflow, evidence of the value of the crops.*

In an action for damages for flooding of lands, evidence of the value of the hay crop raised on said lands in previous year would not of itself be material, but where such evidence was afterwards supplemented by evidence that the price of hay was the same in said previous year, as in the years for which damages were sought, it could not have prejudiced the defendant. *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

(z) *Refusal of instruction that though the jury might find that the cattle were damaged they could consider only such damage as resulted from defendant's acts.*

Where the court specially informed the jury of each of the acts of negligence complained of and supported by evidence, and directed them, that if they found such

negligence, to find the damage sustained from the same, stating in case of the carrier's negligent delay of plaintiff's cattle, such damage to be the decline in values caused thereby, and in case of negligence in failing to have a health certificate accompany the shipment, and in consequence thereof, the cattle were unloaded at destination in pens set apart for infected cattle, and thereby plaintiff sustained loss, to find for him the amount of such loss, defendant was not prejudiced by the refusal of an instruction, that though the jury might find that the cattle were damaged, they could not consider any damage, except such as resulted proximately from defendant's acts. *R. Co. v. Jarman & Arnett* (Tex. Civ. App.), 138 S. W. 1131.

(a-1) *Amount of damages being the only issue, error in instruction on negligence was immaterial.*

In an action to recover damages for injuries sustained by plaintiff in consequence of a fall in a public street of a derrick alleged to have been negligently constructed by defendants, the denial in the answer that the derrick was negligently erected "while plaintiff was engaged at his daily labor," did not put in issue the negligence alleged in the petition, but only the time when the derrick was erected; therefore, the single issue before the jury was, as to the amount the plaintiff was entitled to recover, and if there were any errors in the instructions as to negligence, they were not prejudicial to defendants. *Dowling v. McNelly*, 13 Ky. L. R. (abst.) 368.

(b-1) *Where damages are limited to injury to feelings, charge that "where a tort has been committed, the damages are left to the enlightened conscience of an impartial jury."*

In an action for carrying plaintiff beyond her station, where the recovery for damages was limited to her feel-

ings, a charge that "where a tort has been committed, the damages are left to the enlightened conscience of an impartial jury," though not strictly correct, was harmless error. *R. Co. v. Jett*, 95 Ga. 236, 22 S. E. 251.

(c-1) *Instruction that city was not liable for damages sustained from extraordinary storms.*

In a suit against a city for obstructing surface water, an instruction that the city was not liable for any damages sustained from extraordinary storms, was not prejudicial to plaintiff, because the form was not changed so as to recite that the city was "only liable for damages caused by such rainfalls as might reasonably be expected to occur in the neighborhood drained by its sewers and drains." *Campbell v. City of Vanceburg*, 30 Ky. L. R. 1340, 101 S. W. 343.

(d-1) *Refusal to charge that jury, in assessing damages, might consider plaintiff's failure to complain to defendants before instituting suit.*

In an action for damages for the pollution of a stream, the refusal to charge that the jury, in assessing damages, might consider plaintiff's failure to complain to defendants before instituting suit was harmless, where the court did charge that there could be recovery of such an amount only as would compensate plaintiff for injury sustained by reason of the acts complained of. *West Muncie Strawboard Co. v. Slack*, 164 Ind. 21, 72 N. E. 879.

(e-1) *Error in admitting evidence as to value of farm with clear and with polluted stream cured by instruction not to find such difference in value as damages.*

In an action for polluting a stream passing through plaintiffs' farm, though the court erred in permitting plaintiffs to prove the difference in value of their farm, with a clear stream on it and that with the stream pol-

luted, the error was cured by instructing the jury not to find such difference in value as damages. *Mississippi Mills Co. v. Smith*, 69 Miss. 299, 11 S. 26.

(f-1) *Instruction that if the jury find for plaintiff they can not speculate as to the amount of damages, etc.*

An instruction that if the jury find for plaintiff they can not speculate as to the amount of damages, and, unless they find from the evidence a fixed amount, they can not find more than nominal damages, is not prejudicial to plaintiff, where the verdict is for defendant. *American Syrup & Preserving Co. v. Roberts*, 112 Md. 18, 76 A. 589.

(g-1) *Error in referring to expenses of litigation in awarding damages.*

In an action for negligently killing a person, the counsel for plaintiff stated that the income from \$5,000, especially when something was deducted for the expenses of litigation, would not be a fair substitute, when the statement was objected to. Plaintiff's counsel expressed a willingness to have it struck out, if improper, and the court said it was proper to discuss the question of damages. The sentence was not completed. Held that, though expenses of litigation could not be taken into consideration in awarding damages, the incomplete statement was not reversible error. *R. Co. v. Vihoud*, judgment, 112 Ill. App. 558, affirmed, 212 Ill. 199, 72 N. E. 22.

(h-1) *In action for value of holly delayed in shipment, instruction fixing the damage at price at place of delivery instead of place of shipment.*

In an action to recover the value of a carload of holly delayed in transit until the market was lost, error in fixing the damages according to the price at the place of

delivery instead of at the place of shipment held harmless, where the price at the place of shipment was dependent upon the market price at destination. *R. Co. v. Mabry* (Ark. Sup.), 165 S. W. 279.

(i-1) *Instruction allowing plaintiff to recover for damages "suffered" by himself and wife, by reason of injuries to the wife.*

An instruction allowing plaintiff to recover for damages "suffered" by himself and wife, by reason of the injuries to the wife, is not prejudicial because of the use of the word "suffered" instead of "sustained." *R. Co. v. McNatt* (Tex. Civ. App.), 166 S. W. 89.

(j-1) *Instruction restricting recovery to damages which accrued before the filing of the petition, although amended petition was filed.*

In an action by a life tenant for injuries to his estate, the action of the court in restricting the recovery to those damages which accrued before the filing of the petition, notwithstanding the filing of an amended petition, can not be complained of by the defendant. *Jesel v. Benas* (Mo. App.), 160 S. W. 528.

(k-1) *In a suit for the value of a piano, instruction that the rule of damages was the value of the piano at the time of the attachment.*

In a suit for the value of plaintiff's interest in a piano taken under an attachment and converted by the attachment creditor, an instruction that the rule of damages was the value of the piano at the date of the attachment, instead of at the time of its dissolution, was not prejudicially erroneous, in the absence of a showing that there was a material difference in the value of the piano on such dates. *Pearne v. Coyne*, 79 Conn. 570, 65 A. 973.

(l-1) *In action for damages from overflow from drainage canal, instruction upon the failure of district to exercise the right of eminent domain to widen the channel.*

Where, in an action for damages from intermittent and recurrent overflows from a drainage canal, it was unnecessary for plaintiff to prove negligence in the management of the waters, as the state authority for its construction and providing that the district should be liable for all damage, by reason of overflows, etc., was properly set up in an amended count of the complaint, and there was no proof of any negligence, an instruction upon the failure of the district to exercise the power of eminent domain, to make the channel wide enough to prevent overflow, though not sustained by the evidence, was not prejudicial. *Jones v. Sanitary Dist. of Chicago*, 252 Ill. 591, 97 N. E. 210.

(m-1) *Instruction conditionally authorizing apportionment of damages between two carriers or a joint recovery against both.*

Instruction conditionally authorizing apportionment of damages between two carriers or a joint recovery against both; held, not prejudicial to the initial carrier which became liable for the entire loss. *R. Co. v. A. B. Patterson & Co.* (Tex. Civ. App.), 144 S. W. 698.

(n-1) *In action for the value of timber cut and removed, refusal to charge that the measure of damages was the difference in the value of the land after the timber was cut.*

Where, in an action for the value of timber cut and removed by defendant, the principal element of damages to the land was the timber taken, and plaintiff did not ask any other damage, and the court fixed the market

value of the timber cut as the measure of damages, the refusal to charge that the measure of damages was the difference in value of the land before and after the timber was cut, was not prejudicial to defendant. *Newhouse Mill & Lumber Co. v. Avery* (Ark. Sup.), 140 S. W. 985.

(o-1) *In an action against a town for injuries to sheep by dogs, instruction submitting to jury the damages to the lambs.*

Where, in an action against a town for injuries to plaintiff's sheep by dogs, it was apparent that the jury did not consider any damages on account of plaintiff's crippled lambs, concerning which the evidence was insufficient to afford a basis for the allowance of damages, and the total damage proved, at the lowest valuation, was greater than the verdict, the judgment will not be reversed on appeal because the court erroneously submitted the damage to the lambs to the jury. *Wea Tp. Tippecanoe Co. v. Cloyd* (Ind. App.), 91 N. E. 959.

(p-1) *In action for negligent killing, instruction to assess plaintiff's damages at a sum not exceeding \$5,000, the statutory limit.*

In an action under Revised Statutes 1899, sec. 2861 (Annotated Statutes 1906, p. 1637), giving a right of action for the negligent killing of any person by the servants of certain companies, and declaring that, for each person whose death has been so caused, the company shall pay \$5,000, an instruction to assess plaintiff's damages at a sum not exceeding \$5,000, is harmless, where the verdict was for that amount. *McKenzie v. R. Co.*, 216 Mo. 1, 115 S. W. 13.

(q-1) *Instruction on the question of damages, stating the law less broadly than justified.*

An instruction upon the question of damages which

states the rule less broadly than that justified under the law can not be made the subject of complaint. *Fairview Fluor-Spar & Lead Co. v. Conkle*, 136 Ill. App. 53.

(r-1) *In action for injuries from ice kicked from train by brakeman, instruction authorizing damages if lump was negligently "thrown" or kicked.*

In an action against a railroad company for injuries from being struck by a piece of ice kicked from a passing train by a brakeman, an instruction authorizing damages if the lump of ice was negligently "thrown" or kicked, held not prejudicial. *R. Co. v. Willis*, 31 Ky. L. R. 1249, 103 S. W. 1016.

(s-1) *In a suit for damages from collapse of building, refusal to instruct that absence of permit and plans for part of work were not evidence of negligence.*

In a suit for damages to a tenant caused by the collapse of a building in course of reconstruction, any error in refusing to instruct, that the fact that no formal written building permit was issued, and that no plans were made for a part of the reconstruction work, was not evidence of negligence, was harmless, the court having repeatedly stated what facts would constitute negligence, and at no time specifically mentioned the failure to obtain a permit or to file plans or specifications as among such facts. *Blickly v. Luce*, 148 Mich. 233, 111 N. W. 752, 14 D. L. N. 121.

(t-1) *In personal injury case, erroneous charge upon the subject of vindictive damages.*

It is error for the trial judge to charge upon the subject of vindictive damages in a personal injury case, when the facts are clearly insufficient to justify the allowance of such damages. But for this error the court will not reverse, if it clearly appears that no injury resulted

therefrom. (But for other errors the case was remanded.) *R. Co. v. Lee*, 90 Tenn. 569, 18 S. W. 268.

(u-1) *No recovery cures error relating to the amount of damages.*

Where, in an action for negligent injuries, it is admitted that plaintiff received the injury, error in admitting evidence relating to the amount of damages is cured by a verdict for defendant, which must have been based on want of negligence or on plaintiff's contributory negligence. *Hyatt v. Town of Swanton*, 72 Vt. 242, 47 A. 790.

(v-1) *Court taking a portion of assessment of damages from the jury.*

Where the court has taken the question of the assessment of the amount due for attorney's fee, by the terms of a note, from the jury, and assessed it himself, and in adding it to the amount found by the jury may have committed error, yet such verdict, being harmless to the defendant, the verdict will not be reversed. *Bank v. Knipe*, 6 Wash. 348, 33 P. 834.

(w-1) *Instruction failing to limit the recovery to reasonable damages.*

Where, in an action for injuries, a physician's testimony that his charge for medical services was reasonable was uncontradicted, though another physician testified for the opposing party, an instruction which fails to limit plaintiff's recovery for services, "to their reasonable value." is harmless error. *Grady v. St. Louis Transit Co.*, 102 Mo. App. 212, 76 S. W. 673.

(x-1) *Erroneous instruction as to damages for wrongfully killing a bull.*

In an action against a railroad to recover double damages for killing plaintiff's bull, the lowest estimate made

by the witnesses as to its value was \$50, the highest \$75; the jury assessed the damages at \$100. In its instructions the court charged that the jury, if they found for the plaintiff, should find the value of the bull, giving damages in double the value, "and if they saw fit give interest over and above the value." Held, that the instruction relative to interest, while error, was harmless, as it was apparent that no interest was calculated in the verdict. *Wade v. R. Co.*, 78 Mo. 362.

(y-1) *Refusal to give instruction on one element of damage.*

Where the instruction of the court clearly eliminates from the consideration of the jury one element of damage, and it is evident from the verdict that the jury did not consider it, a judgment will not be reversed for a refusal to give a request on the subject. *Abrey v. City of Detroit*, 127 Mich. 374, 86 N. W. 785, 8 D. L. N. 311.

(z-1) *Including in charge element of damages which should have been omitted.*

Error in the form of an instruction authorizing the consideration of an element of damages that ought to have been eliminated, is not prejudicial to the party in whose favor it was given. *Village of Plymouth v. R. Co.*, 139 Mich. 347, 102 N. W. 947, 11 D. L. N. 898.

(a-2) *Modification of charge on the subject of damages that was immaterial.*

Where defendants to an action on a note relied upon the recoupment of damages for an alleged breach of warranty, and there was no evidence to show a warranty, and the jury did not find that there was any, a modification of defendant's request to charge on the subject of damages was immaterial. *Worth v. McConnell*, 42 Mich. 473, 4 N. W. 198.

(b-2) *Refusal of instruction as to damages sustained, "including loss of time and bodily pain and suffering."*

Though the jury found for plaintiff on one count, he was not prejudiced by an instruction to find for him "such damages for his personal injuries as he has sustained," or by the refusal of an instruction to find for him his damages sustained by the hurt, "including loss of time and bodily pain and suffering." *Floyd v. Henderson & Corydon Gravel Road Co.*, 21 Ky. L. R. 1718, 56 S. W. 6.

(c-2) *Instruction including taxes as part of damages recoverable as compensation for improvements made on land in good faith.*

Where, in an action under Revised Statutes 1879, sec. 2259, to recover compensation for improvements made on the land in good faith, the jury found the total value of the land for the improvements paid less than the value of the improvements, and a judgment in accordance with sec. 2263 was entered requiring plaintiff to pay defendant the value of the land as fixed by the jury, an instruction authorizing the jury to allow the amount of taxes on the land paid by plaintiff, if erroneous, was not prejudicial. *Stump v. Hornbeck*, 15 Mo. App. 367.

(e-2) *Court requiring jury to find that defendant acted maliciously and without probable cause to award actual damages.*

One sued for false imprisonment may not complain because the court erroneously required the jury to find that he acted maliciously and without probable cause before awarding actual damages. *Wehmeyer v. Mulvhill*, 150 Mo. App. 197, 130 S. W. 681.

(f-2) *Instruction that jury might consider a tender of goods seized in mitigation of damages.*

Where, in an action by a mortgagee in possession against execution creditors of the mortgagor for damages from the levy of execution on and removal of the mortgaged property, there was no evidence of such mitigation, an erroneous instruction that the jury might consider a tender of the goods seized by plaintiffs, in mitigation of the damages, was harmless to defendants. *Howell v. Caryl & Co.*, 80 Mo. App. 440.

(g-2) *Instruction unduly limiting damages for wrongful death.*

In an action for the death of plaintiff's husband, error in instructing that she might recover as a penalty, not less than \$2,000 nor more than \$10,000, being the amounts allotted under Revised Statutes 1899, sec 2864, as amended by laws 1905, p. 135 (Annotated Statutes 1906, p. 1637), and also that her damages be assessed upon the pecuniary value of the husband's life, as provided in Revised Statutes 1899, sec. 2866 (Annotated Statutes 1906, p. 1646), was harmless, where the jury returned a verdict for \$5,800, this amount being so much less than the maximum, viz., in the first part of the instruction, as to show that this part did not influence their consideration. *Potter v. R. Co.*, 142 Mo. App. 220, 126 S. W. 209.

(h-2) *Instruction authorizing the jury to award not to exceed \$25,000 damages.*

Where, in an action for injuries, plaintiff claimed damages in the sum of \$25,000, an instruction that, if the jury found for the plaintiff, they should assess his damages "at a sum not exceeding \$25,000, as they might believe, from the evidence, that he had sustained," while

objectionable, as tending to mislead the jury to believe that their finding for the full amount would meet the court's approval, was not reversible error. *Stid v. R. Co.*, 236 Mo. 382, 139 S. W. 172.

(i-2) *Instruction submitting loss of time as an element of damages was not reversible error.*

In an action for damages for an assault in which plaintiff testified generally that he was a farmer and had to work for a living, it was not reversible error to submit loss of time as an element of plaintiff's damage, though the value of his time was not directly proved, since a jury would allow the reasonable value of his time from the circumstances in evidence, especially where defendant did not request an instruction limiting such damage to nominal damages. *Jennings v. Appleman* (Mo. App.), 139 S. W. 817.

(j-2) *Giving or withholding of instruction as to exemplary damages was immaterial.*

Where, in an action for malicious trespass, the question of malice having been submitted to the jury, under proper instructions, and the verdict being for defendant, the giving or withholding of instructions relating to exemplary damages is immaterial. *Fast v. Lyman*, 9 Mont. 62, 22 P. 120.

(k-2) *Instruction allowing damages to woman, without showing she was single, for loss of services in keeping house.*

Where a woman, in a personal injury suit against a city, was allowed by an instruction to recover damages for loss of services in keeping house, without affirmatively showing that she was single, and that the services belonged to her, such instruction was not prejudicial error, where the defendant in effect admits that she is

single. *Smickle v. City of St. Joseph*, 155 Mo. App. 308, 136 S. W. 752.

(l-2) *Failure of the jury to award nominal damages when substantial justice has been done.*

Where substantial justice has been done, a new trial will not be granted for the failure of the jury to award nominal damages. *Watson v. Van Meter*, 43 Iowa 76; *Norman v. Winch*, 65 Iowa 263.

(m-2) *Error in not finding nominal damages for defendant was harmless.*

The plea being admitted and no evidence offered, the error in not finding nominal damages for defendant was harmless. *Briggs v. Cook*, 99 Va. 273, 38 S. E. 148.

(n-2) *Jury erroneously apportioning damages against two railroads.*

In an action against two railroad companies for negligence whereby plaintiff was injured, the jury, by their special finding, fixed the damages at \$5,000, and required the one defendant, the said railroad company, to pay \$2,000, and the other, the street car company, to pay \$3,000. Held that, even if the jury had not the right to so apportion the \$5,000, the defendants were not prejudiced, since otherwise there would have been a joint judgment against both for \$5,000, the whole of which might have been recovered from one. *R. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Ky. L. R. 725, 9 Am. St. Rep. 309.

(o-2) *Where jury awarded only compensatory damages, submitting question of punitive damages was harmless.*

Where the jury awarded compensatory damages only, error in submitting the question of punitive damages

was not prejudicial to defendants. *Bank v. Smith* (Iowa Sup.), 119 S. W. 726; *Hill v. Houser* (Tex. Civ. App.), 115 S. W. 112; *Jones v. Monson*, 137 Wis. 478, 119 N. W. 179.

(p-2) *Where temporary injunction was dissolved, court assessing the damages before rendering decision on the merits.*

Where, in a suit in equity, in which a temporary injunction was dissolved, the court, without objection to the evidence to ascertain the damage, assessed the damages before the rendition of a decision on the merits of the case, and there was no objection made at the time, nor any question raised that the amount allowed was excessive, the irregularity of assessing the damages before the decision on the merits was not ground for reversal under Statutes 1898, sec. 2829, providing that the court shall disregard any errors not affecting the rights of the adverse party, etc. *Lewis v. Town of Eagle* (Wis. Sup.), 115 N. W. 361.

(q-2) *Where jury allows proper damages, erroneous instructions on the subject are harmless.*

Where the jury allows proper damages, error in the instructions on the subject is harmless. *Atwater v. Whiteman* (Minn.), 41 F. 427; *Pettis v. Brewster*, 94 Ga. 527, 19 S. E. 755; *R. Co. v. Pumphrey*, 59 Md. 390; *Doyn v. Ebbeson*, 72 Wis. 284, 39 N. W. 535.

(r-2) *After verdict for plaintiff, court assessed the damages.*

Where, after a verdict for plaintiff, the court instead of the jury assesses the damages, interest on a note, the appellate court affirmed the judgment, because the error, if any, did not injure defendant. *Medler v. Hiatt*, 14 Ind. 405.

(s-2) *Party can not complain of recovering more damages than entitled to.*

A party can not complain of a court's ruling as to the measure of damages, where it gives him a greater amount than he is entitled to. *Eaton v. Gladwell*, 121 Mich. 444, 6 D. L. N. 531, 80 N. W. 292.

(t-2) *Error as to damages harmless where jury awards proper.*

Where the jury allows proper damages error in the instructions on the subject is harmless. *Simpson v. Kimberlin*, 12 Kan. 579.

(u-2) *Excessive damages will not reverse, it not appearing that jury were actuated by passion or prejudice.*

The court is slow to reverse for excessive damages, in an action for a personal injury, it not appearing that the jury were actuated by passion or prejudice. *R. Co. v. Godfrey*, 52 Ill. App. 564; *Lincoln v. Johnson*, 37 Ill. App. 453.

(v-2) *Error of jury in awarding damages, subject to their discretion will not reverse.*

A judgment will not be reversed in an action sounding in damages, where the damages are in the discretion of the jury, merely because the court may regard the sum awarded as too great or too small. *Treffert v. R. Co.*, 36 Ill. App. 93.

(w-2) *Inadequacy of recovery not a ground of error.*

The judgment will not be reversed on the ground that the damages awarded are inadequate, where a new trial was denied below, apparently on the ground that there was no right to recover. *Lovett v. Chicago*, 35 Ill. App. 570.

(x-2) *De minimus non curat lex.*

A judgment may be affirmed, where the sum involved in the alleged error, if anything, is so inconsiderable as not to warrant a retrial. *De minimus non curat lex.* *Engel v. Fisher*, 44 Ill. App. 362; *Mulcahey v. Straus*, 52 Ill. App. 352.

(y-2) *A case will not be reversed merely to enable appellant to recover nominal damages.*

A case will not be reversed, where such reversal would not avail appellant to recover more than nominal damages. *Davis's Est., in re Root's Appeal*, 11 Mont. 217, 27 P. 342; *Ramsdell v. Clark*, 20 Mont. 114, 49 P. 591; *Allen v. Michel*, 38 Ill. App. 313; *Boyden v. Moore*, 5 Mass. 565.

(z-2) *Considering the character of the injuries to the wife, the reasonable damages cured erroneous charge on the subject.*

A charge of the court that the jury might, in fixing the damages of the wife, consider the remote possibility of her husband's death, and, in the event thereof, the possible loss to her in her earning power thereafter, was error; but in view of the reasonableness of the damages awarded in the case, considering the character of the injuries to the wife, and the evidence, and lack of harm to defendant arising from the erroneous instruction, the verdict should not be set aside. *Johnston v. R. Co.*, 65 N. J. L. 421.

(a-3) *Improper instruction permitting the award of punitive damages.*

Where, in an action for carrying passenger beyond her station the verdict is for an amount not larger than plaintiff is fairly entitled to as compensatory damages, it will be presumed that the jury did not allow punitive

damages, and the instruction that they might is error without prejudice. *Lamson v. R. Co.* (Minn. Sup.), 130 N. W. 945.

Sec. 242. Death, actions for wrongful.

(a) *Improper evidence in action for wrongful death.*

In an action for wrongfully causing death to a steam-boat hand by ordering him and seven other men to go out over the water on a poplar plank eleven inches wide, three and one-fourth inches thick, and sixteen feet long, error, if any, in admitting evidence that a bystander said immediately after the plank broke, and while the men were in the river, that he knew the men "would break that plank with all of them on it, because it cracked with four of us," was harmless, since any jury would know that such a plank would break with the weight of eight men. *Packet Co. v. Samuel's Adm'r*, 22 Ky. L. R. 979, 59 S. W. 3.

(b) *In action for damages for causing death, improper testimony of family left by decedent.*

In an action for damages for causing death, it was harmless error to admit testimony as to the family left by decedent, where the widow and children were present at the trial. *R. Co. v. Taafe's Adm'r*, 106 Ky. 535, 21 Ky. L. R. 64, 50 S. W. 850.

(c) *In action for wrongful death, evidence by widow that she had one child.*

In an action for negligence resulting in death the admission of evidence by the widow of the deceased that she had one child was not prejudicial, where the instructions to the jury did not authorize them to consider the statements in determining the damages. *R. Co. v. Sampson's Adm'r*, 97 Ky. 65, 16 Ky. L. R. 819, 30 S. W. 12.

(d) *In action for death from negligence, judgment on conflicting evidence.*

Where a licensee caught his foot in an interurban railway track and could not get off, and was killed by a car, and others with him were signaling the motorman to stop, and the motorman testified that he saw persons on the track in time to stop, but did not see the signals or the peril, a verdict for the plaintiff will not be reversed as against the weight of the evidence, and a charge that it is the motorman's duty to keep a lookout on the track, if too broad, yet in view of the motorman's evidence was not prejudicial. *R. Co. v. Dameron*, 14 O. C. C. n. s. 49, 23 O. C. D. 123, affm'd, 86 O. S. 321.

(e) *In action for wrongful death, exclusion of evidence that deceased could not obtain life insurance.*

In an action for wrongful death, the erroneous exclusion of evidence that deceased could not obtain life insurance held harmless. *Nicoll v. Sweet* (Iowa Sup.), 144 N. W. 615.

(f) *In an action for death, evidence that deceased was wealthy.*

Where, in an action for death, most of the evidence turned on the issue of contributory negligence, the admission of proof that deceased was a wealthy man, and had money at interest, if error, was harmless. *Proper v. R. Co.*, 136 Mich. 352, 99 N. W. 283, 11 D. L. N. 35.

(g) *Admitting statement made by a bystander that, in his opinion, death of sailor was due to the negligence of officers and crew.*

A statement made by a bystander to the captain of a vessel, after the drowning of a member of the crew, giving his opinion that it was due to the fault or negligence of the officers and crew in failing to save the drowning

man, was not admissible in evidence as part of the *res gestae*, but its admission was harmless error, where the jury, by special finding, placed the liability on the vessel's owner for the death on other grounds. *Wash. Puget Sound Nav. Co. v. Lavender* (Wash.), 160 F. 851, 87 C. C. A. 655.

(h) *Admission of evidence to show plaintiff was dead when judgment was recovered.*

Where the court charges that a certain judgment vested in plaintiff thereunder the title to the land therein recovered, the admission of evidence to show that plaintiff was dead when the judgment was rendered, is not assignable as error, since under such charge the jury could not have considered the judgment invalid: *Flores v. Maverick* (Tex. Civ. App.), 26 S. W. 316.

(i). *In action for death from negligence, permitting the widow to testify that she had no property.*

Where, in an action for death, the uncontradicted proof showed that decedent was about twenty-eight years old and in perfect health, earning \$65 a month, and the jury awarded \$4,800, giving the widow \$2,300, and the child, born after decedent's death, \$2,500, error in permitting the widow to testify that she had no property was not prejudicial. *Con. Ga. Elec. Light & Power Co. v. State*, 109 Md. 186, 72 A. 651.

(j) *In action for negligent death, admitting testimony that decedent, after the accident was conscious, and stated that he would leave his children in bad shape.*

Where, in an action for negligent death, a witness testified, without objection, as to the condition of decedent's family, and the verdict was not excessive, the error, if any, in admitting the testimony of a witness that decedent, after the accident was conscious, and

stated that he would not recover and would leave his children in bad shape, was not prejudicial. *Southern Anthracite Coal Co. v. Hodge* (Ark. Sup.), 139 S. W. 292.

- (k) *In action for death of plaintiff's husband, admission of testimony that she had no other means of support than the earnings of her husband.*

In an action for causing the death of plaintiff's husband, the admission of testimony that plaintiff had no other means of support than the earnings of her husband, the petition containing such an allegation, which was not objected to, did not prejudice defendant nor require a reversal of the judgment, where evidence was given in connection with testimony as to the amount of her earnings, and the jury was correctly instructed as to the measure of damages. *Gundy v. Nye-Schneider-Fowler Co.* (Neb. Sup.), 131 N. W. 964.

- (l) *In action for the death of plaintiff's wife, admission of evidence that she left two sons and three daughters.*

In an action for the death of plaintiff's wife, resulting from a defective stair-railing, the admission of evidence that she had left two sons and three daughters, was harmless as an attempt to arouse the sympathies of the jury, where all the children, save one, were witnesses in the case. *Koskoff v. Goldman* (Conn. Sup.), 85 A. 588.

- (m) *In action for wrongful death, charge that widow could recover only such damages as the jury might find she suffered by being deprived of her husband's contributions from personal earnings.*

Where, in an action for death, the court assumed that there was some evidence that decedent's widow had sustained pecuniary loss from his death, and that she had

received support from his earnings, an instruction that she could only recover such damages as the jury might find she suffered by being deprived of his contributions from personal earnings, and not from the income of his other property, could not have been the cause of the verdict in favor of defendant, there being other issues in the case on which such verdict could have been found, and, if erroneous, was harmless. *Proper v. R. Co.*, 136 Mich. 352, 99 N. W. 283, 11 D. L. N. 35.

(n) *In action for wrongful death, instruction that the jury could not consider the pecuniary value of decedent's life, etc.*

Though, in an action against an electric railway company for the death of a pedestrian struck by a car, an instruction that on finding for plaintiff, the jury could not consider the pecuniary value of decedent's life, and could award punitive damages only, might have been refused as being misleading, in omitting to contain definite directions for assessing punitive damages, it was not reversible error. *Randle v. Birmingham Ry. Light & Power Co.* (Ala. Sup.), 53 S. 918.

(o) *In action for death of servant, instruction that master must provide a safe place to work, and is liable for failing to do so, unless servant guilty of "proximate negligence."*

In an action for death, an instruction that it is the duty of a master to provide a safe place for his servant to work, and he can not escape responsibility for a failure to do so, unless it is shown that the servant was guilty of "proximate negligence," in the assumption of obvious risks, which resulted in his injuries, was not prejudicial, there being no evidence of contributory negligence. *Christiansen v. Floriston Pulp & Paper Co.* (Nev. Sup.), 92 P. 210.

Sec. 243. Ejectment.

- (a) *Where, in ejectment case, all claim title from common source, improper testimony is harmless.*

Where the plaintiffs and defendants in ejectment claim land from a common source of title, errors in allowing improper evidence of the title under which all the parties claim, are harmless. *Rhodus v. Hoffernan*, 47 Fla. 206.

- (b) *In action of ejectment, erroneous admission of mortgage.*

Where a judgment, sheriff's sale and deed, constituted the complete defense to an action of ejectment, the erroneous admission of the mortgage on which the judgment was based did not materially affect the merits of the action, and furnishes no ground for reversing the judgment. *Hoskisson v. Adkins*, 77 Mo. 537.

- (c) *In action of ejectment, erroneous admission of tax receipts.*

In ejectment, the admission of tax receipts showing payment by plaintiff of taxes on the premises for certain years, which had no bearing whatever on the issues, is not reversible error. *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. 6.

- (d) *In action of ejectment to show title, admission in evidence of original tract-book.*

Though it is not necessary in ejectment to show the title to land has passed from the government, where both parties claimed under a subsequent common owner, the admission of the original tract-book, if error, is harmless. *Witherington v. White* (Ala. Sup.), 51 S. 726.

- (e) *Instruction in ejectment case that defendants had reclaimed and tilled the land occupied by them.*

An instruction in ejectment that defendants had re-

claimed and tilled land occupied by them was harmless to plaintiff, if erroneous, where most of the facts regarding the improvements and cultivation were brought out by plaintiff's counsel. *Pauley v. Brodnax* (Cal. Sup.), 108 P. 271.

(f) *Occupation being by consent, verdict in ejectment undisturbed.*

Testimony tending to show that the occupation by defendant of that part of the street between the center thereof and abutting blocks of the plaintiff in ejectment was by consent of plaintiff; held, sufficient to preclude any disturbance of the verdict, though there is evidence of a contrary import. *Griffin v. R. Co.*, 33 Fla. 606.

Sec. 244. False imprisonment.

(a) *In suit for false imprisonment and malicious prosecution, charge assuming that defendant made defense of justification.*

In a suit for false imprisonment and malicious prosecution, defendant can not object that the court assumed that he had made the defense of justification and charged accordingly, since, if he had no defense of justification he would not be harmed. *Grimes v. Greenblatt*, 47 Col. 495, 107 P. 1111.

(b) *In action for false imprisonment error in charge as to exemplary damages.*

In an action for false imprisonment against two defendants, error, if any, in charging that exemplary damages were limited to such sum as would constitute a just verdict against the defendant least culpable was harmless, where the jury found in favor of one defendant: *Love v. Hallady*, 139 Mich. 575, 102 N. W. 1027, 12 D. L. N. 9.

(c) *In action for false imprisonment, exclusion of evidence that defendant acted in good faith.*

Where the jury, in an action for false imprisonment, failed to find exemplary damages, the exclusion of evidence that defendants acted in good faith and without malice, is harmless error, as such evidence could not be received to diminish the actual damages. *Tenney v. Harvey & Smith*, 63 Vt. 520, 22 A. 659.

(d) *In action for false imprisonment, evidence from plaintiff, on cross-examination, that he frequented the office of a deputy sheriff.*

In an action for false imprisonment and malicious prosecution, testimony elicited from plaintiff on cross-examination, that he knew a certain deputy sheriff, other than the one who made the arrest, and had been in his office a couple of times, was not prejudicial as conveying the impression that plaintiff was a violator of the law, and as such frequently came in contact with officers. *Lansky v. Prettyman*, 140 Mich. 40, 103 N. W. 538, 12 D. L. N. 120.

(e) *In action for false imprisonment, error in excluding answer of witness, where witness gave all the particulars.*

In an action for false imprisonment, error in excluding the answer of the witness characterizing defendant's treatment of plaintiff as, "I thought then and think now that defendant's treatment of plaintiff was indecent, brutal, and unbecoming an officer and a gentleman," is harmless, where the answer gave all the particulars of the treatment, detailing the acts and words, so as to enable the jury to judge of the character thereof. *Kendall v. Limberg*, 69 Ill. 355.

Sec. 245. Fraud.

- (a) *Recovery being had, it was immaterial that neither defendant was found guilty of fraud.*

Where, in an action to rescind a conveyance for fraud, the evidence showed that one defendant was not guilty of fraud, and plaintiff obtained by the judgment all the relief he was entitled to against the other defendant, it was immaterial whether a finding that neither defendant was guilty of fraud was sustained. *Donnelly v. Cunningham*, 61 Minn. 110, 63 N. W. 246.

- (b) *Where averment is untrue, erroneous sustaining of demurrer to replication charging fraud is harmless.*

Where an averment of fraud in a replication is shown by a party's own evidence to be untrue, the sustaining of a demurrer to such pleading is harmless error. *Dwyer v. Rohan*, 99 Mo. App. 120, 73 S. W. 384.

- (c) *Refusal to strike reply alleging fraud, where no evidence was offered in support of such issue.*

Refusal of the court to strike out a portion of a reply alleging fraud in the procurement of a contract pleaded in the answer, where the record shows that no evidence was offered in support of the issue as to fraud. *Powell v. Bosard*, 79 Mo. App. 627.

- (d) *On issue of fraud, charge on the hypothesis that bill of sale was intended as a mortgage.*

On an issue of fraud as against creditors in a sale of personal property, where a change of possession of the property was purely technical, and it to all outward appearance remained in the same position as before the alleged sale, a charge on the hypothesis that the bill of sale was intended as a mortgage was harmless, though there was no evidence to sustain this hypothesis. *Hackler v. Evans*, 70 Kan. 896, 79 P. 669.

(e) *Refusal to strike from the files stipulation obtained by fraud.*

A party can not maintain error upon a refusal to strike from the files a stipulation obtained by fraud, where the stipulation has never been acted upon, and so has no effect upon the result. *Links v. Mayer*, 22 Ill. App. 489.

(f) *Proof of fraud rendered declaration of grantor competent.*

Where, after declarations of the grantor were admitted, evidence was introduced showing the existence of a conspiracy to defraud his creditors by a fraudulent disposition of the property in controversy, such proof rendered the declaration competent, and the error, if any, committed in first admitting the declarations in evidence was thereby cured. *Daniels v. McGinnis*, 97 Ind. 549.

(g) *Admission of evidence of similar fraudulent scheme in another county of which plaintiff had notice.*

In an action by the assignee, on notes executed by the maker, believing them to be a contract giving him the right to sell window locks, error in admitting evidence as to a similar fraudulent scheme pursued by the payees in another county, after plaintiff had purchased the notes sued on, offered to show that plaintiff had knowledge when purchasing of the circumstances under which the notes were procured was not reversible, where the other evidence amply justified a finding that plaintiff had sufficient notice to put him on inquiry as to the fraudulent scheme when it purchased. *Bank v. Tuttle*, 144 Mo. App. 294, 127 S. W. 918.

(h) *In action for fraudulent representations, admission of incompetent evidence of the value of the property.*

In an action for fraudulent representations, by which it was alleged plaintiff was induced to purchase corporate stock, where it was shown that defendant had grossly exaggerated

the value of the corporation property, the admission of incompetent evidence as to the value of such property was not reversible error. *Brattebo v. Tjernagl*, 91 Iowa 283, 59 N. W. 278.

- (i) *In action for damages for fraud, whereby title to land was lost, erroneous evidence of plaintiff's efforts to raise money.*

In an action to recover damages for fraudulently procuring plaintiff to execute a note and mortgage, whereby title to land was lost, but not until plaintiff had sold to another, evidence of plaintiff's efforts to procure money to pay off the mortgage, and of his inability to do so on account of incumbrances was admitted. Held, that the element of damage resulting from loss of title having been eliminated under the instructions of the court, the evidence was error without prejudice. *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411.

- (j) *Excluding question as to purpose to defraud in making certain entries rendered immaterial when jury found same were made in good faith.*

Error, if any, in excluding a question to a party as to a purpose to cheat or defraud in making certain book entries of cash received from sales of goods, is rendered immaterial by a finding that such entries were not arbitrarily made, but that they truly represented cash received by him for goods actually sold. *Greenleaf v. Egan*, 30 Minn. 316, 15 N. W. 254.

- (k) *Exclusion of evidence tending to prove fraud in procuring a bond.*

Exclusion of evidence tending to show fraud in procuring the bond sued on is not prejudicial, where neither the pleas stricken out nor those on which the case was tried were sufficient to present any issue of fraud going to the validity of the contract. *Supreme Council C. K. of America v. Fidelity & Casualty Co. of N. Y.* (Tenn.), 63 F. 48.

- (l) *In action for fraud, exclusion of evidence that agent had sold plaintiff's goods at very low prices.*

In an action by a wholesale dealer against a retailer, plaintiff claimed that pursuant to a fraudulent combination between defendant and one of plaintiff's agents, the agent had sold him goods at prices greatly below their real value and plaintiff's prices for the same, whereby plaintiff had sustained the damages sued for. Held, it being undisputed that the agent did sell at such prices to defendant, there was no prejudice to defendant in the exclusion of evidence that the agent had sold plaintiff's goods to other merchants at exceedingly low prices. *Crenshaw v. A. F. Shapleigh Hardware Co.* (Ark. Sup.), 100 S. W. 882.

- (m) *Excluding evidence tending to show plaintiff's fraud in misrepresenting goods.*

In an action against a railway company for injuries to a passenger, where there was no evidence tending to show a knowledge on the part of the plaintiff of the difference in the rate on immigrant's outfits and similar freight shipped on an ordinary bill of lading, it was not prejudicial error to exclude evidence tending to show fraud in making representations that his goods were immigrants' outfits, and thereby securing reduced freight rates and free transportation for himself. *R. Co. v. Schroeder* (Tex. Civ. App.), 100 S. W. 808.

- (n) *Where parties to an exchange of property sought to be rescinded for fraud, and value treated by parties as immaterial, immaterial evidence received.*

Where, in an action to rescind an exchange of property the parties treated the value of the properties exchanged as immaterial, and evidence thereon is admitted over plaintiff's objection, the judgment should not be reversed, since, if immaterial, it could not prejudice plaintiff. *Norris v. Crandell*, 133 Cal. xix, 65 P. 568.

- (o) *Wide latitude to defense to show fraud did not prejudice the rights of the plaintiff.*

Where the circuit judge, in his discretion, has allowed a wide range of examination by the defense to show fraud, and testimony is admitted in reply of doubtful relevancy, a court of review ought not to reverse a judgment for an error in admitting such testimony, unless clearly satisfied that its admission had prejudiced the legal rights of the plaintiff in error. *Comstock v. Smith*, 20 Mich. 338.

- (p) *In an action for fraud in the exchange of a farm, plaintiff's counsel characterizing defendant as a villain and a perjurer.*

In an action to recover for fraud in the exchange of a farm, a remark of plaintiff's attorney, in addressing the jury, that he could not escape conviction from the conduct of defendant in the case as a villain and a perjurer, was not reversible error, though the court in its charge did not direct the jury to disregard the remark. *Zimmerman v. Investment Co.* (Minn. Sup.), 126 N. W. 282, Lewis, J., dis.

- (q) *Verdict of a jury on the question of fraud will be affirmed.*

The verdict of a jury will be affirmed on the question of fraud, though the question be not free from suspicion. *Richardson v. Parry*, 3 La. Rep. 529, 10 L. R. 369.

- (r) *After four verdicts for fraud the court will not remand.*

After four verdicts against defendant on a question of fraud, the supreme court will not remand the cause, though it be of different opinion. *Shimmin v. Jones*, 5 Martin's Rep. (La.) 463.

- (s) *Instruction which failed to explain the word "fraudulently."*

In an action for deceit, defendant was not prejudiced by

a charge to find for plaintiff, if defendant falsely and "fraudulently" represented certain facts, but which did not explain the word "fraudulently," as the word might have been omitted, and the use of it injected an immaterial issue into the case. *Brownlee v. Hewitt*, 1 Mo. App. 360.

(t) *Failure to submit issue of fraud to the jury.*

Where defendant, in a personal injury suit against a street railway, pleaded a release, and plaintiff in reply alleged want of consideration, fraud and non est factum, on the first and third of which issues the jury found for plaintiffs, failure to submit the issue of fraud to the jury was not prejudicial to defendant. *R. Co. v. Heath*, 29 Ind. App. 395, 62 N. E. 107; *Woodward v. Bayne*, 53 Ind. 176.

(u) *Refusal to give instruction as to defendant's fraud.*

Plaintiff is not prejudiced by a refusal of the court to give an instruction respecting a defendant's fraud, where the jury found defendant guilty of fraud. *Schloss v. Estey*, 114 Mich. 429, 72 N. W. 264, 4 D. L. N. 614.

(v) *Instruction that alleged fraud in price must have equalled the amount of the notes.*

An instruction that both the notes in a suit were given in part payment on stock of goods, yet, if there was no fraud in the price there could be no recovery, without stating that the fraud in price must have equalled the amount of the notes, was harmless, where the fraud which was practiced necessarily amounted to more than the notes. *Bales v. Heer*, 91 Mo. App. 426.

(w) *Instruction telling the jury that the fraud of plaintiff would be "of the highest character."*

In a suit on a note, where the defense was fraud, the judge instructed the jury that taking the note under the circumstances alleged by defendant would be "fraud of the

highest character." Held, that defendant could not complain that the fraud was described of the "highest character," on the ground that the jury might have been willing to find plaintiff guilty of a small fraud, although not of a great one. *Bank v. Hewitt*, 52 Me. 531.

(x) *Charge that fraud was a partial, instead of a complete, defense to a contract, where whole defense fails.*

Though fraud alleged by defendant is a complete defense to a contract, and the judge charges that it is a partial defense, yet the error is not prejudicial, if it appears that the jury rejected the whole defense offered. *Baum Iron Co. v. Berg*, 47 Neb. 21, 66 N. W. 8.

(y) *In action for misrepresentation, instruction that "the person making such representations can not say that he is a person on whom no reliance can be placed."*

In an action for misrepresenting a company to be solvent whereby plaintiff was induced to make an unprofitable logging contract with it, the court, in instructing on one's liability for making such misrepresentation added, "And the person making such representation can not say that he is a person on whom no reliance can be placed." Held, that the quoted clause was not reversible error. *Simons v. Gissna* (Wash. Sup.), 110 P. 1011.

Sec. 246. Insurance.

(a) *In action on fire policy, admitting evidence for defendant that a material part of the building fell before fire reached it.*

Any error in admitting evidence, in an action on a fire policy, in which defendant claimed that a material part of the building, in which the insured goods were, was destroyed by earthquake before the fire, that the building was "doomed to destruction by fire, whether or not it had fallen by reason

of the earthquake," was not prejudicial to defendant, where the only issue was, whether the fire attacked the goods before a substantial part of the building fell, and the court instructed the jury to find for defendant, if it appeared that a substantial part of the building fell before the goods were attacked by the fire. *Fountain v. Insurance Co.* (Cal. App.), 117 P. 60.

(b) *In action on tornado policy, receiving testimony concerning storm which injured insured property not responsive to question asked.*

In an action on a tornado policy, any error in receiving testimony concerning the storm which injured the insured property, the testimony not being responsive to a question asked a witness, is not ground for reversing the judgment for plaintiff, the testimony being immaterial to the issues. *Lomack Home, etc., v. Insurance Co.* (Iowa Sup.), 133 N. W. 725.

(c) *In action on fire policy, permitting insured to testify to what the property was worth to her.*

In an action on a fire policy, any error in permitting the insured to testify as to what the destroyed property was worth to her, is not injurious to defendant, where the amount of the verdict is fully sustained by other evidence. *Insurance Co. v. Wood* (Tex. Civ. App.), 133 S. W. 286.

(d) *In action on fire policy, refusal to permit answer as to how long before the fire plaintiff purchased the goods.*

In an action on a fire policy, the court's refusal to permit an answer to a question as to how long before the fire plaintiff had purchased the goods insured was not ground for reversal. *Bever v. Insurance Co.*, 141 Mo. App. 589, 125 S. W. 1184.

(e) *Introduction of duplicate instead of original life policy.*

The error is technical and insufficient ground for reversal where, in an action on a life policy, the plaintiff was permitted to introduce a duplicate, instead of the original, policy in evidence, there being no controversy that the original was, in all respects, correct. *Knights of Pythias v. Allen*, 104 Tenn. 623, 58 S. W. 241.

(f) *Admission of irrelevant evidence in action on fire policy cured by instruction.*

In an action on a fire insurance policy, where the defense was an increase of risk on the part of plaintiff, the court allowed evidence to be introduced as to the knowledge of defendant's agent of the erection of new buildings, which was wholly irrelevant. Later, the court withdrew this evidence and instructed the jury that the agent's knowledge could not affect the company, nor release the plaintiff from his duty to notify defendant of any actual increase in the risk. On appeal, held, that the error was cured by the instruction. *Insurance Co. v. Gruver*, 100 Pa. 266.

(g) *Erroneous exclusion of policy of insurance barred company to complain of its own act.*

A life insurance company, in an action against it to recover back premiums paid, on its refusal to receive further premiums, on the ground that the policy was forfeited, objected to the admission of the policy in evidence when offered by plaintiff. Plaintiff recovered judgment, and the company took a writ of error. The supreme court, on the ground that the question of forfeiture, on which the case turned, could be determined only from the policy itself; held, that its conclusion was error, but having been brought about by the company itself, it could not complain thereof. *Insurance Co. v. McAden*, 109 Pa. 399.

(h) *Admission of proofs of loss after expiration of time limit.*

Where proofs of loss of insured property were not furnished within the time required by the policy, proofs of loss furnished thirty days after the expiration of such time, were inadmissible in an action on the policy, but were harmless, the evidence showing that the insurer had waived the requirement as to proofs of loss. *Fulton v. Phoenix Insurance Co.*, 51 Mo. App. 460.

(i) *In action on policy, admission of copy of application.*

In an action on a policy, the erroneous admission in evidence of the copy of an application of the insured, in pursuance of which the policy was granted by defendant, was not prejudicial. *Dawson v. Insurance Co.*, 38 Mo. App. 355.

(j) *Admission in evidence of statement by company's agent interpreting clause in policy of marine insurance.*

In an action on a marine insurance company's policy, error in admitting testimony of plaintiff as to statements by the company's agent regarding the meaning of a clause in the policy relating to the proportion of expense to be borne in recovering the property was harmless, where it was the conclusion of the court that, under the clause in question, the company was not entitled to the expense it incurred before it determined to deny its liability for the loss, and abandoned its proposal to recover the property, that being the only amount in dispute. *Insurance Co. v. Monarch*, 99 Ky. 578, 18 Ky. L. R. 444, 36 S. W. 563.

(k) *Exclusion of testimony of verbal transfer of policy of insurance.*

The exclusion of testimony in relation to a verbal

transfer of the policy of insurance was harmless, where the witness was allowed to testify that the policy was turned over by the insured to plaintiffs to be collected, and the proceeds distributed to the creditors of the assured. *Frankenthal v. Insurance Co.*, 76 Mo. App. 15.

- (l) *In action on policy, charge that if plaintiff, in his proof of loss or examination, adopted any statement by anyone else which was false, etc., he became responsible therefor.*

In an action on a fire policy transferred to plaintiff by the original insured, there was evidence that plaintiff, in making his proof of loss and in his examination under oath, based his estimate of the value of the destroyed articles upon invoices shown him by the original insured when he purchased the goods a month before the fire, and that some of the articles were excessively valued and others shown in the proof did not exist, and the evidence made it a jury question whether plaintiff, in making proof of loss, had reason to and did believe that the invoices were correct. The court instructed that if plaintiff, in his proof of loss or examination, adopt any statement of any one which was false, without attempting to know or investigate the truth of such matters, "and without any grounds for adopting such statement, he became responsible therefor as false," requiring a finding for defendant. Held, that while it would have been better to have used the word "reasonable" before "grounds," it was not affirmative error to modify the instruction by inserting the quoted words, it not appearing that defendant was prejudiced thereby. *Insurance Co. v. Nidiffer* (Va. Sup.), 72 S. E. 130.

- (m) *In action on benefit policy, instruction ignoring the question of notice and proof of sickness.*

In an action on a mutual benefit insurance policy, error

in instructions given by the court, in ignoring the question of notice and proof of sickness, was not prejudicial, where defendant itself offered evidence showing substantial compliance with the requirements of the policy as to such notice. *Shuler v. American Benev. Ass'n*, 13 Mo. App. 123, 111 S. W. 618.

(n) *In action on accident policy, instruction that if injury happened while insured was attempting to get on moving train he could not recover.*

In an action on an accident insurance policy, where a witness testified that insured was between the second and third cars of a moving train, with his foot upon the side of cars, trying to retain his position, and climbing up through the cars, an instruction that if the injury happened while insured was engaged in an attempt to get upon a moving train, he could not recover, was not so inapplicable to the evidence as to be prejudicial. *Flower v. Casualty Co.* (Iowa Sup.), 118 N. W. 761.

(o) *In action on insurance commission contract, refusal to instruct as to damages for the loss of additional commission on insurance.*

By an agreement for one year from July 1, 1905, plaintiff was to advance defendant R certain monthly payments and retain to reimburse himself ten percent of the commissions due on insurance solicited by R. Plaintiff was to pay R \$2,000 in addition to regular certain commissions if he wrote \$500,000 of insurance within a year, and \$4 per \$1,000 additional commission for all insurance over \$500,000, advancements in excess of amounts retained from commissions, if any, to be repaid to plaintiff at the end of the year. A bond, dated July 1, 1905, was signed by S as R's surety on November 1, 1905, and was delivered to plaintiff as security. There was evidence that the September advancement was not

indefinitely postponed by agreement between plaintiff and R, but S knew of this when the bond was executed. R did not write insurance to the amount of \$500,000, and plaintiff sued for excess of advancements over the amount credited for commissions. Held, that since the jury in finding in favor of plaintiff for the money advanced must necessarily have found that plaintiff's failure to make the September payment did not interfere with R's writing \$500,000 of insurance, refusal to instruct as to damages from the loss of additional commissions on insurance that might have been written in excess of \$500,000 was not prejudicial. *Powell v. Fowler*, 85 Ark. 451, 108 S. W. 827.

(p) *Instruction on life policy that defendant, after two years, could not avail itself of a false representation in the application.*

An erroneous instruction, in an action on a life policy, that defendant could not avail itself of a false representation in an application after two years was harmless, where there was no evidence tending to show that the answers of insured were false. *Robertson v. Fraternal Union of America*, 85 S. C. 221, 67 S. E. 247.

(q) *In action to recover insurance, instruction failing to state facts constituting abandonment of steamboat.*

In an action to recover insurance on a steamboat, which was sunk and abandoned, the jury should have been told what constitutes abandonment, and whether the acts done by plaintiff constituted abandonment; but as the controversy was not over the subject of abandonment, but over the seaworthiness of the vessel and the conduct of the captain in navigating her, and the loss was treated by both parties as an actual loss, failure to instruct as to abandonment could not have prejudiced defendant. *Lockwood v. Insurance Co.*, 46 Mo. 71.

- (r) *In action on life policy, erroneous instruction where defense claimed the insured was alive.*

An instruction in an action on a policy for life insurance in which the defense was that the insured was still alive, though objectionable in failing to confine the inquiry of the jury as to the death and the period for which insured had paid the premium, was not ground for reversal, where there was no pretense that he died about that time or that death had occurred at all. *Lancaster v. Insurance Co.*, 62 Mo. 121.

- (s) *In action on accident policy, instruction diminishing recovery if plaintiff was engaged in a hazardous occupation when injured.*

In an action on an accident policy, providing that if insured was injured while engaged in an act or occupation classified as more hazardous than that for which the policy was issued, he should receive only the indemnity for the more hazardous occupations, there being no evidence that plaintiff was injured while so engaged, any inaccuracy in submitting the question whether he was so engaged when injured, was harmless to the insurer. *Rosebery v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785.

- (t) *Instruction ignoring three-fourths value clause in fire policy was not prejudicial.*

In an action on a fire insurance policy, a charge ignoring the three-fourths value clause was not prejudicial, where the evidence showed that three-fourths of the value of the property destroyed exceeded the total amount of insurance. *Maliñ v. Insurance Co.*, 105 Mo. App. 625, 80 S. W. 56.

- (u) *Erroneous charge as to liability on an insurance policy.*

A policy covered all direct loss or damage by light-

ning, but excepted that by wind, and where the building was destroyed in a thunder storm, the court charged that, if lightning was the primary cause, the jury might give a verdict for the whole amount claimed, but if it was not, they give only such verdict as would compensate for the damage directly caused by lightning. Held that, when the verdict was for less than half the amount claimed, the error was not ground for reversal. *Beakes v. Insurance Co.*, 54 St. Rep. 290, 71 Hun 613, 24 N. Y. Supp. 544, rev. o. o. g. 143 N. Y. 402, 62 St. Rep. 425.

(v) *In action on life policy, instruction failing to state all the facts necessary to support finding of death from seven years' unexplained absence.*

Where, in an action on a life policy, based on the presumption of death of the assured arising from an absence of seven years, there was evidence of casual departure and his not being heard from for seven years, and there was nothing in the evidence of the surrounding circumstances to account for his absence on any theory, and there was no controversy in the evidence, so that the jury could not have found otherwise, without resorting to conjecture, the failure of an instruction to state all the facts going to make up the case was not prejudicial. *Biegler v. Supreme Council A. L. H.*, 57 Mo. App. 419.

(w) *Instruction on iron-safe clause in a fire policy not in issue.*

In an action where compliance with the iron-safe clause in a fire policy was waived, and the only question was the extent of the loss under the policy, an instruction that, if insured failed to comply with the iron-safe clause, was not material to the risk, the failure was no defense, though unnecessary, was not prejudicial to insurer. *Culver v. Insurance Co.*, 141 Mo. App. 205, 124 S. W. 540.

- (x) *In action by insurance agent for commission, an instruction that the contract, on its face, was between plaintiff and defendant.*

In an action against a life insurance company for commissions, it was shown that defendant had filed in the office of the state superintendent of insurance a certificate that it had appointed a certain general agent, with full power to appoint all local, special, or general agents for the state and that such appointments should be as valid as if made directly by the officers of the company; and it was further shown that the general agent had written plaintiff authorizing him to solicit applications for defendant, on a certain schedule of compensation, and that plaintiff had accepted the proposition. Held, that if there was technical error in the instruction, that the contract, on its face, was a contract between plaintiff and defendant, it was harmless, since, in the light of the certificate of the general agent's authority, it was defendant's contract in effect. *Insurance Co. v. Ornauer* (Col. Sup.), 90 P. 846.

- (y) *In action on life policy, instruction authorizing recovery if insured did not know of unsoundness and answered questions honestly.*

In an action on a life policy, where the evidence showed that defendant was in good health at the time of signing the application, unless she had heart disease, and the jury found that she did not have heart disease, an instruction which might be construed as authorizing a recovery in case insured did not know of her unsoundness of health, and answered the questions honestly, was not prejudicial. *Perry v. Insurance Co.*, 147 Mich. 645, 111 N. W. 195, 14 D. L. N. 19.

- (z) *In an action on an accident policy, where evidence established total disability, harmless error in instructing as to class of business which he might transact.*

In an action on an accident policy, where the evidence established total disability from transacting any business, error in instructing as to the class of business which he might transact under the policy was harmless. *Bean v. Insurance Co.*, 94 Cal. 581, 29 P. 1115.

- (a-1) *Instruction which rendered amount paid on policy immaterial.*

In an action on a policy, where plaintiff testifies that he paid \$50 on the contract, it is harmless error to exclude evidence that he stated to the adjuster that he had paid \$150, where, under the instructions, the amount paid is immaterial. *Wooliver v. Insurance Co.*, 104 Mich. 132, 62 N. W. 149.

Sec. 247. Interest.

- (a) *Error in instructing for interest cured by awarding none.*

An instruction for an allowance of interest, not warranted by the evidence, is harmless, where no interest is allowed. *Angus v. Foster*, 42 Ill. App. 19; *McCarty v. Quimby*, 12 Kan. 494; *Noe v. Hodges*, 24 Tenn. (5 Humph.) 103; *Eddy v. Lafayette*, 163 U. S. 456, 41 L. ed. 225.

- (b) *Failure of the court to permit the jury to compute the interest at the legal rate.*

Where an action was based on defendant's written statement of the items of the account sued on, and the balance claimed was admitted, a judgment on a directed verdict for plaintiff for the amount of the account, with interest, will not be reversed because the court did not permit the jury to compute the amount of interest, at

the legal rate, since under Revised Statutes 1899, sec. 865 (Annotated Statutes 1906, p. 812), a judgment must not be reversed for errors which do not materially affect the merits. *Beekman Lumber Co. v. Acme Harvester Co.*, 215 Mo. 221, 114 S. W. 1087.

(c) *Slight error in computing interest disregarded.*

In an action for an accounting under a contract where there was a slight error in the computation of interest, which would doubtless have been corrected, if attention had been called to it at the time of the trial, the matter will not be considered on appeal. (Wis. Sup.) *Rust v. Fitzhugh*, 112 N. W. 508; *Hoffman v. Wm. Loud & Sons Lumber Co.*, 138 Mich. 5, 11 D. L. N. 662, 100 N. W. 1010; *Id.* 138 Mich. 5, 12 D. L. N. 356, 104 N. W. 424.

(d) *Instruction allowing jury discretion neither to allow nor to withhold interest.*

In an action to recover for hay destroyed by fire set by defendant's locomotive, an instruction that the measure of damages is the market value of the hay when burned, with interest from such time, is erroneous in not leaving to the jury any discretion as to withholding or allowing interest, but is no ground of reversal, where it appears that the jury did not, in fact, allow interest. *Eddy v. Lafayette* (Ind. Ter.), 49 F. 807, 1 C. C. A. 441, *affm'd*, 163 U. S. 456, 41 L. ed. 225.

(e) *Instruction faulty in omitting plaintiff's right to interest.*

On an application to plaintiff to make a mortgage loan, he applied to defendant for a certificate of title, which defendant furnished. Defendant omitted a notice of a *lis pendens*, in an action in which the borrower's title was afterwards defeated. Plaintiff made the loan, and alleged that he loaned \$160, and that all but \$35 was paid when the trust deed was foreclosed. The answer

denied that any money was loaned. At the trial plaintiff introduced the borrower's notes, amounting to \$160, and testified that he loaned her the full amount. Her husband testified that he negotiated the loan, and that only \$125 was actually loaned. The court declared the law to be that if, before advertisement was begun of the sale under the deed of trust, all the money actually loaned had been repaid, the verdict must be in favor of defendant. Held that, though the instruction was faulty in omitting the plaintiff's right to interest, as he had alleged in his petition, that all but \$35 had been paid, and, if so, he had received more than \$125 and interest, he was not prejudiced by such error. *Dyer v. St. Louis Trust Co.*, 97 Mo. App. 177, 70 S. W. 939.

(f) *Erroneous allowance of interest will not disturb the judgment.*

When the interest erroneously allowed on the dissolution of an injunction does not exceed the damages which should have been allowed, the judgment will not be disturbed. *Hood v. Knox*, 8 La. Ann. 73.

(g) *Defendant can not complain that he was not allowed interest where it would have been offset by greater judgment for plaintiff.*

In an action on an account, the court did not allow plaintiff interest on his account or defendant interest on his demand against plaintiff. There was judgment for plaintiff, whose judgment would have been larger had interest been allowed both. Held, that defendant could not complain because he was not allowed interest. *Gibson v. Jenkins*, 97 Mo. App. 27, 70 S. W. 1076.

(i) *An appellate court will not consider a mere question of interest, which was not made an issue in the case.*

The alleged error in withdrawing the question of

tender from the jury will not be reviewed, where it affects only the question of interest, which was not made an issue in the case. *Berlin v. R. Co.*, 141 Mich. 646, 9 D. L. N. 205.

Sec. 248. Landlord and tenant.

- (a) *In action by landlord against railroad, admission of improper evidence of temporary damages.*

In an action by a landlord against a railroad company for permanent injuries resulting from overflows, the admission of incidental evidence as to temporary damages to the land is not reversible error, where the jury is instructed that the right of action for all damages of a temporary nature is in the tenant, and that the landlord can not recover therefor. *R. Co. v. Harmenson* (Tex. Civ. App.), 22 S. W. 764.

- (b) *Instruction authorizing verdict for plaintiff if landlord was making repairs, which was contrary to the evidence.*

Where a landlord was liable for injuries to a tenant's servant, irrespective of whether he was making repairs at the time of the accident or had completed them, the error in an instruction authorizing a verdict for plaintiff, on a finding that the landlord was making repairs, while the evidence showed that he had completed them, was harmless. *Grant v. Tomlinson*, 138 Mo. App. 222, 119 S. W. 79.

Sec. 249. Leases.

- (a) *In an action on a lease, failure of plaintiff to allege performance of covenants.*

Failure of plaintiff, in an action for rent, to allege performance, or an excuse for non-performance, of the covenants of the lease to be performed on the part of

the lessor, if error, is error without injury, where a conveyance was set up in a counterclaim and every breach therein alleged, and the case is tried on the issues thus raised. *Gillespie v. Hagans*, 90 Cal. 90, 27 P. 34.

(b) *Exclusion of lease, which contained an agreement of the lessee.*

Defendant, who had contracted to furnish plaintiff with iron required in its business, leased its mills to a second company, which agreed to fulfill its contracts, including that with plaintiff. In an action by plaintiff for a breach of the contract, defendant pleaded a novation as a defense. Held, that the lease containing the agreement of the lessee was not admissible in behalf of defendant as a link in the chain of evidence to prove novation, but that its exclusion was harmless error, where there was no evidence tending to show any agreement on the part of the plaintiff to accept the lessee and release defendant from the contract. (Ill.) *Illinois Car & Equipment Co. v. Linstroth Wagon Co.*, 112 F. 737, 50 C. C. A. 504.

(c) *In action for damages to a leasehold, admission of evidence as to the actual value of money at the time of the injury.*

In an action by a lessee for damages to the leasehold, where he testified as to the value of the land and of the leasehold, and the court charged that the measure of damages was the market value of money at the time of the injury, if error, was not prejudicial. *Kishlar v. R. Co.*, 134 Cal. 636, 66 P. 848.

(d) *Rejection of lease as evidence, where its reception could not have changed the result.*

Where the court can see that the reading of the lease would or could not have produced a different result, the rejection of the lease was not such error as requires a

reversal of the judgment. *Fowler v. Nixon*, 7 Heiskel (Tenn.) 719.

(e) *Error in receiving written lease in evidence in action to recover rent on subsequent verbal one.*

The admission of a former written lease in evidence, in an action to recover rent on a subsequent verbal one will not be ground for reversal, if the error appears harmless. *De Laittre v. Jones*, 36 Minn. 519, 32 N. W. 709.

Sec. 250. Libel and slander.

(a) *In action for slander, defendant pleaded justification and denial, required to elect, stood on justification.*

In an action for slander the defendant pleaded justification, and also denied having maliciously and falsely spoken the words charged, and he was required to elect between his pleas, electing to proceed on the plea of justification. At the trial the court let in evidence as to the whole occurrence, and the defendant, in his testimony, admitted speaking the words charged. Held, that the ruling requiring the election, if erroneous, was harmless. *Johnson v. Featherstone*, 141 Ky. 793, 133 S. W. 753.

(b) *Erroneous, but harmless answer of witness, in action for slander.*

A complaint in slander alleged the commission of a certain larceny, and that defendant said of the plaintiff, "He is the man who took the money; I know it." A witness to the speaking was further asked what the defendant meant, and answered, "I suppose he meant that A was the man who stole the money." Held, that the admission of this evidence, if not strictly correct, did not prejudice the defendant. *Justice v. Kirlin*, 17 Ind. 588.

- (c) *In action for slander, evidence of inability of plaintiff to procure employment.*

Defendant, in an action for slander, is not harmed by plaintiff's testimony that she failed to procure employment by reason of the slander, where no special damages are allowed by reason thereof. *Courtney v. Blackwell*, 150 Mo. 245, 51 S. W. 668.

- (d) *Admission of statement by witness that plaintiff in libel case was greatly distressed by the publication.*

The admission in evidence, in a libel case, of a general statement by a witness, that plaintiff "was very much distressed" by the article published, was not prejudicial error, and where the charge made against the plaintiff, in the article, was of such a character that the jury would have been warranted in finding such fact, even without proof. (N. Y.) *N. Y. Eve. Journal Pub. Co. v. Simon*, 147 F. 224, 77 C. C. A. 366, writ of cer. den. 203 U. S. 589.

- (e) *Evidence of utterance of slanderous words prior to dates alleged in the petition allowable.*

Where the court, at the conclusion of the testimony, in an action for slander, required the jury to find that the slanderous words were spoken during designated months, in order to find a verdict for plaintiff, the admission of evidence of what defendant had said prior thereto, and the refusal to confine the scope of the inquiry to slanderous utterances during the designated months were not erroneous. *Kunz v. Hartwig*, 151 Mo. App. 94, 131 S. W. 721.

- (f) *In action for libel, permitting witnesses to state what the article meant.*

In an action for libel, error in permitting witnesses to state what they understood the article to mean was

harmless, where no other construction of the article was possible. *Jacksonville Journal Co. v. Beymer*, 42 Ill. App. 443.

- (g) *Where it was conceded that libellous article referred to plaintiff, exclusion of another article to show that fact immaterial.*

Where it is expressly conceded that an article in a newspaper claimed to be a libel referred to plaintiff, it is not a material error to refuse to admit another article offered to show that the plaintiff was the party intended by the libellous publication. *Peoples v. Evening News Ass'n*, 51 Mich. 11, 16 N. W. 185, 691.

- (i) *In an action for libel, erroneous evidence of rumors impeaching plaintiff's character, cured by instruction to jury to disregard it.*

In a libel suit the erroneous admission of evidence concerning rumors as to plaintiff's character, forms no ground for reversing the judgment, if the jury were expressly charged that rumors would not relieve defendant's liability. *Wheaton v. Beecher*, 79 Mich. 443, 44 N. W. 927.

- (j) *Testimony of the previous utterance of slanderous words.*

Testimony as to the previous utterances of slanderous words, if improperly admitted, because too remote, is not prejudicial where the verdict is not excessive. *Weicherding v. Krueger*, 109 Minn. 461, 124 N. W. 225.

- (k) *Judgment for plaintiff for slander not reversed for improperly excluded evidence in mitigation of damages.*

In an action for slander, the declaration charged that defendant stated that plaintiff had killed, concealed and

eaten a hog, and that he was a hog thief, and defendant pleaded not guilty. Defendant offered in mitigation of damages to prove by a witness, that the witness had lost a hog, and witness charged a slave of plaintiff with having stolen it, which the slave denied; that witness then applied to plaintiff to know if he knew anything about the hog, and which plaintiff acknowledged that a hog of the description given had been killed at his house, and agreed that it was witness's hog; that witness informed defendant of the facts before defendant spoke the words charged in the declaration. Held, that the judgment for plaintiff would not be reversed because the court excluded these facts. *Chestwood v. Mays*, 3 Munford (Va.) 16.

(l) *Damages awarded in a libel case deemed not excessive.*

The court will not set aside the verdict of \$3,000 as excessive, considering the evidence as to the character, standing and business of the plaintiff, in connection with the injurious tendency of the libel, and the wide circulation of the paper of defendants in which the publication was made, there being nothing to indicate that the jury was controlled in the amount of its verdict by any improper influences or prejudices, and the amount not appearing to be grossly excessive. *Jones v. Greely*, 25 Fla. 629.

(m) *Charge directing jury, in libel case, if facts and circumstances justify, to award punitive damages.*

It is not error in a libel case to charge the jury that, if they are satisfied the publication was made from "ill will," meaning express malice, they may find exemplary or punitive damages to such amount as the facts and circumstances in evidence may justify. *Montgomery v. Knox*, 23 Fla. 595.

- (n) *Erroneously instructing the jury that they were the "sole judges of the law of libel as well as of the facts."*

Although the court, in an action for libel, contained in a circular issued by defendant, should have instructed the jury that they were the judges of the law only so far as the question of whether the alleged circular was libellous, an instruction that they are the "sole judges of the law of libel as well as of the facts," will not be ground for reversing the judgment, in view of the fact that all the other instructions were correct, and the jury were properly allowed to say whether the circular was libellous or not. *Arnold v. Jewett*, 125 Mo. 241, 28 S. W. 614.

- (o) *Publishing article, after knowledge of its falsity, prevents reversal for erroneous instructions.*

An instruction "that the reporter of defendant company newspaper had knowledge, prior to the publication of the article, that the article was untrue, and that he could easily ascertain and did ascertain that it was untrue, and the negligence of the paper to ascertain was culpable, which neglect the jury have a right to consider in assessing the damages in the case," is erroneous, as being contradictory and confusing, but it is not ground for reversal, where it was proved, beyond controversy, that such article was published after notice of its falsity. *Hatt v. Evening News Ass'n*, 94 Mich. 114, 53 N. W. 952.

- (p) *In action for slander, erroneous charge that because no plea of justification had been filed and no claim made that plaintiff was guilty, a conclusive presumption arose that plaintiff was not guilty.*

Where, in an action for slander, there was no evidence that plaintiff was guilty of the charge made by the

slanderous statement, an instruction that, because no plea of justification had been filed and no claim made that plaintiff was guilty, a conclusive presumption arose that plaintiff was not guilty, though erroneous, was not prejudicial. *Schultz v. Guldenstein*, 144 Mich. 636, 108 N. W. 96, 13 D. L. N. 348.

(q) *Jury instructed to disregard all evidence of publication of libel by others cured its admission.*

A charge to the jury that they were to disregard the evidence of the publication by others of the libel complained of; held, to cure the error, if any, in its admission. *Van Ingen v. Mail & Express Pub. Co.*, 14 Misc. 326, 70 State Rep. 355, 35 N. Y. Supp. 838, *affm'd*, 156 N. Y. 376.

(r) *Instruction authorizing recovery for slanderous words uttered beyond the statute of limitations.*

Instructions authorizing recovery for slander uttered beyond the statute of limitations are harmless error, where the evidence fails to show slander beyond the statutory period. *Miller v. Dorsey*, 149 Mo. App. 24, 129 S. W. 66.

(s) *Refusal, in action for slander, to charge that speaking words not charged in the petition was harmless.*

The refusal of the court to charge, in an action for slander, that there could be no recovery for the speaking of words not charged in the petition, was harmless, where there was evidence that the words charged in the petition were spoken. *Baldwin v. Fries*, 46 Mo. App. 288.

(t) *Where two defendants were jointly charged with libel, instruction that jury could find a verdict against one, though co-defendant be held not guilty.*

Where two defendants were jointly charged with pub-

lishing a libel, an instruction that the jury could find a verdict against one of the defendants, if he was liable for the publication, though they might believe that the co-defendant had no connection with it, was not prejudicial to plaintiff, as it was in his favor. *Chrocki v. Stahl* (Cal. App.), 110 P. 957.

- (u) *Instruction, in action for slander, that the jury might consider other slanderous words than those set out in the petition, but of similar import.*

Error in instruction, in an action for slander, that the jury might consider other slanderous words than those set out in the petition, but of similar import, not only as showing malice, but "in aggravation of damages," was without prejudice, where it is apparent from the whole record, including the amount of the recovery, that the jury were not influenced by the error. *Bloomfield v. Pinn*, 84 Neb. 472, 121 N. W. 716.

- (v) *In action for slander, instruction authorizing a verdict for plaintiff, if defendant falsely uttered words which, in common acceptance, amounted to the charge complained of.*

Where, in a slander complaint, proof of use of the words of the complaint showing, without question, the use of the words substantially different from those alleged in the complaint, but which amounted to the charge complained of, an instruction authorizing a verdict for plaintiff if defendant falsely uttered words which, in their common acceptance, and under the circumstances, amounted to the charge complained of, was not prejudicial for failing to limit its application to words substantially the same as those alleged in the complaint for, on the evidence being admitted without objection, the pleading might be considered as amended to conform

to the proof. *Townsley v. Yeusch* (Ark. Sup.), 135 S. W. 882.

(w) *In action for slander, instruction that it was sufficient to prove the words substantially as charged in the declaration.*

In an action for slander the declaration alleged that defendant had said of plaintiff, that he had "caught him stealing," and had "caught him stealing his (appellant's) coal," and witness testified that defendant said, "I have caught (plaintiff) stealing coal," and another witness testified that defendant said, "I caught plaintiff stealing coal." Held that, in view of the testimony, an erroneous instruction that it was sufficient to prove the words substantially as charged in the declaration, was harmless. *Moore v. Maxey*, 152 Ill. App. 647.

Sec. 251. Malicious prosecution.

(a) *In action for malicious prosecution, giving for malice the meaning of probable cause was not misleading.*

In an action for malicious prosecution, the trial judge, after referring to the question of probable cause, in his charge said, "What is malice? It is a reasonable ground of suspicion, supported by circumstances, sufficient to warrant an ordinarily prudent man in suspecting the party guilty of the crime charged." Held that, as the obvious purpose was to define probable cause, but as no one reading or hearing the instructions would suppose, for a moment, that they were intended as a definition of malice, there was no reversible error. *Jones v. Matheis*, 17 Pa. Super. Ct. 220.

(b) *Error in admitting testimony, in action for malicious prosecution, that defendant told prosecuting attorney all he knew about the case.*

In an action for malicious prosecution and false im-

prisonment, error in admitting general testimony of defendant that he told the prosecuting attorney all he knew about the case, was not ground for reversal, where the undisputed facts clearly established probable cause for making the criminal complaint, regardless of the advice of the prosecuting attorney. *Lansky v. Prettyman*, 140 Mich. 40, 103 N. W. 538, 12 D. L. N. 120.

- (c) *In action for malicious prosecution, evidence that in the criminal prosecution the jury at first stood seven for acquittal and five for conviction.*

In an action for malicious prosecution, evidence that in a criminal action the jury were out a considerable time, and at first stood seven for acquittal and five for conviction, though erroneous, was not prejudicial to plaintiff. *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625.

- (d) *One suing for malicious prosecution, after a discharge by a committing magistrate, allowed to show failure of grand jury to indict.*

That one suing for malicious prosecution, after a discharge by a committing magistrate, was allowed to show a failure to indict by the grand jury, was harmless. *Stewart v. Blair* (Ala. Sup.), 54 S. 506.

- (e) *Exclusion of two questions in action for malicious prosecution cured by other evidence.*

In an action for malicious prosecution the case recited that defendant offered W, who lived four miles from plaintiff, as a witness, to testify as to the character of plaintiff. Defendant's counsel asked witness whether plaintiff "had been damaged in the neighborhood," because of the prosecution, and he testified that he thought he stood as high as ever in his (W's) community, but that he could not say as to any other community. He

was then asked whether he had been damaged in the community in which he (W) lived. The question was objected to by plaintiff and excluded, the court remarking, "Plaintiff has not put his character in issue. He does not claim damages to his character. It is irrelevant." Plaintiff was asked on cross-examination whether he did not stand as well as ever in the community, which question was objected to, and ruled out, the court saying, "This is not a question of character;" but in the same cross-examination plaintiff testified that he supposed he did stand as well as ever around his home, but not at other places where he was not known. Held that, in view of the testimony which W and plaintiff were permitted to give, the exclusion of the two questions, if error at all, was harmless. *Taylor v. Domisk*, 36 S. C. 368, 15 S. E. 591.

(f) *In action for malicious prosecution, the court instructed, "If you find there was no probable cause then the jury would be at liberty to infer malice from want of probable cause."*

In an action for malicious prosecution, an instruction, "If the jury find there was no probable cause, then the jury would be at liberty to infer malice from want of probable cause," while not reversible error, is so near to a charge on the facts that it is better practice to omit it. *McCall v. Alexander* (S. C. Sup.), 65 S. E. 1021.

(g) *In action for malicious prosecution, instructing jury to assess the damages within the limit of the ad damnum, but to conform to the facts and circumstances.*

Where the jury, in an action for malicious prosecution, were told to assess the damages within the limit of the ad damnum, but were also told to confine such assessment to "the facts and circumstances of the case," such

instruction was equivalent to instructing them to confine the assessment to the facts "as shown by the evidence," and while the instruction may be of doubtful propriety, it does not call for a reversal, in view of the damages awarded by the jury. *Treptow v. Montgomery*, 153 Ill. App. 422.

(h) *In action for malicious prosecution, erroneous instruction cured by verdict for plaintiff supported by the evidence.*

An instruction, in an action for malicious prosecution which holds the defendant responsible for a report made by some other person, assuming to act in his behalf, which was neither authorized nor ratified by him, is bad; but if, notwithstanding the misinstruction, a verdict, supported by the evidence, be found for the plaintiff, it will be accepted as conclusive of the facts upon review. *Struby-Estabrook Mercantile Co. v. Kyes*, 9 Col. App. 190. 48 P. 665.

Sec. 252. Mandamus.

(a) *Where there was no disputed fact for a jury to pass upon, transferring mandamus suit to equity docket was harmless.*

Transferring a mandamus suit to the equity docket is without prejudice if there is no disputed question of fact for the jury to pass on. *Croft v. Colfax Electric Light & Power Co.*, 113 Iowa 455.

(b) *Alternative writ of mandamus, unsealed and signed by wrong officer, does not warrant a reversal of the judgment.*

Though an alternative writ of mandamus did not bear the seal of the court, and was signed by the circuit judge, instead of by the clerk, a refusal to sustain an objection to it by motion, affected no substantial right, would not

require a reversal of a judgment for relator. *State v. Oates*, 86 Wis. 634, 57 N. W. 296, 39 Am. St. Rep. 912.

(c) *In mandamus, although general denial in the record, the court "for want of answer and return," ordered peremptory writ to issue.*

On an application for mandamus, the court, after sustaining exceptions to the whole answer as a return to the writ, including that taken to the general denial, then sustained a demurrer to the said answers, on the ground that they were not sufficient to constitute a defense, and subsequently, notwithstanding this, left the general denial in the record, the court "for want of an answer and return" ordered a peremptory writ to issue. Held, that a substantially right result having been reached in the case, the judgment will not be reversed for this error. *McGee v. State*, 103 Ind. 444, 3 N. E. 139.

(d) *Clerical error will not defeat a judgment rendered in a mandamus proceeding.*

A clerical error in the judgment rendered in a mandamus proceeding is not fatal. *Bayliff v. Reilly*, 149 Ill. App. 236.

Sec. 253. Margin contract.

(a) *On construction of alleged margin contract, instruction that it was a mixed question of law and fact.*

The court instructed the jury that the question whether a contract between the plaintiff and defendants was a margin contract was a mixed question of law and fact. Defendants contended that a remark of the trial court, that an admission made by their witness, supported plaintiff's theory that it was a margin contract, when taken in connection with the fact that the court also refused an instruction that, whether the contract was a

margin contract, was a question for the jury, was prejudicial to them. Held, that the action of the court was not prejudicial, since the question whether admitted facts constituted a margin contract was purely one of law, and the instruction given by the court was proper. *Parker v. Otis*, 130 Cal. 322, 62 P. 571, rehearing den. 130 Cal. 322, 92 Am. St. Rep. 56, 62 P. 927, 92 Am. St. Rep. 168, 187 U. S. 606.

Sec. 254. Negligence.

(a) *Submitting the question whether there was negligence other than that alleged.*

Where the prime cause of injury, in an action for negligent death is clearly shown to be due to defendant's negligence in a certain respect, error in submitting whether there was other negligence is harmless. *R. Co. v. Massie's Adm'r* (Ky. Ct. App.), 128 S. W. 330.

(b) *Where there was no evidence that plaintiff was negligent, instruction authorizing finding against defendant, notwithstanding plaintiff was negligent.*

Where there was no evidence to show that plaintiff was negligent, appellant could not complain of an instruction authorizing a finding against defendant, notwithstanding the plaintiff was negligent, because defendant had not specifically pleaded plaintiff's contributory negligence, while prohibiting a finding against appellant's co-defendant, who had pleaded plaintiff's contributory negligence, in case the jury found he was negligent. *Kirk v. Santa Barbara Ice Co.* (Cal. Sup.), 108 P. 509.

(c) *Where plaintiff was injured by an explosion of dynamite, charge that if plaintiff failed to prove specific negligence, if due to any negligence of defendant, plaintiff could recover.*

Where plaintiff was blown out of bed in her home

1,030 feet from the place where dynamite was stored in unstable and unprotected building, in close proximity to a thickly settled neighborhood, plaintiff being entitled to recover, irrespective of the degree of care exercised by defendant to avoid the explosion, error in charging that plaintiff had failed to prove the negligence specifically alleged by her, but that if the explosion was due to any negligence of defendant, plaintiff could recover, was not prejudicial. *Scalpinio v. Smith* (Mo. App.), 135 S. W. 1000.

(d) *In action against two connecting carriers, charge permitting recovery against one for negligence occurring on line of the other.*

Conceding that, in an action against two connecting carriers for damages to a shipment of cattle, the court erred in a charge permitting recovery against one for negligence occurring on the line of the other, the error was harmless, where the evidence failed to show any negligence against the other, and the jury were also told that if they believed plaintiff was damaged wholly by the negligence of one defendant, they should return a verdict against that defendant alone, and the verdict and judgment were in favor of the other. *R. Co. v. McIlhaney* (Tex. Civ. App.), 129 S. W. 153.

(e) *Instruction that negligence is a want of that degree of care which a majority of careful and prudent persons are accustomed to exercise, etc.*

In an action against a railroad company for the wrongful death of a track laborer, an instruction that negligence is a want of that degree of care which a majority of careful and prudent persons are accustomed to exercise for their own protection, is not prejudicial error, despite the improper use of the word "majority." *R. Co. v. Gamble's Adm'x*, 156 Ky. 91, 160 S. W. 795.

- (f) *Instruction referring to the negligence of defendant, "as charged in the declaration," instead of embodying the facts constituting such negligence, was not reversible error.*

The giving of an instruction referring to the negligence of the defendant "as charged in the declaration," instead of embodying the facts constituting such negligence, does not constitute reversible error. *Stuchly v. R. Co.*, 182 Ill. App. 337.

- (g) *Erroneous instruction on negligent act, where verdict was based on another.*

An instruction that, even if the engineer gave the necessary signals on approaching the crossing, yet, if he unnecessarily opened the valves so as to allow the steam to escape, and thus frightened plaintiff's horse, defendant would be liable, is harmless error, where the special finding conclusively shows that the only act of negligence on which the verdict is based, is the failure to give the proper signals. *R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1, Ross, J., dissenting.

- (h) *Refusal to charge that wilfulness could not exist if negligence existed.*

Where, in an action for injuries, the jury were properly instructed as to what proof was necessary to make out a case of negligent injury and also to make out a case of wilful injury, defendant was not prejudiced by the refusal of an instruction that wilfulness could not exist if negligence existed. *Ind. Street R. Co. v. Taylor*, 39 Ind. App. 592, 80 N. E. 436.

- (i) *Irrelevant charge, in action to recover for negligence, which did not work any injury to defendants.*

When the evidence of plaintiff charged the accident to the want of proper care or skill of the driver, an instruc-

tion that defendants were liable for insufficiency of coaches, horses or harness is objectionable as irrelevant, but as it would work no injury to defendants is not a sufficient cause to disturb a judgment for plaintiff. *Thorne v. California Stage Co.*, 6 Cal. 232.

(j) *In action for negligent injuries, charge that plaintiff might recover for all suffering occasioned by the accident and jury might consider the fact that she was enceinte.*

In an action for injuries plaintiff claimed that one result was a miscarriage, and the court charged that plaintiff might recover for all suffering occasioned by the accident, and that the jury might consider the fact that she was enceinte. It also gave defendant's request, that the fact that plaintiff had a miscarriage did not give her any right to damages, but that she must show that the injury was caused by defendant's negligence, and then instructed that the miscarriage did not give plaintiff any right to any damages, but might be considered, if it was produced by the accident. Held that, in the absence of a request for further instructions defendant could not complain. *Tunncliffe v. R. Co.*, 107 Mich. 261, 65 N. W. 226.

(k) *Instruction that if jury found that defendant who dug the hole, "entered upon said premises, without the knowledge and consent of the plaintiff, or her brother or sister, and tore up the pavement," etc., they should find for plaintiff.*

Plaintiff, with her brother and sister, were tenants of a house situate about ten feet from the sidewalk. During the absence of plaintiff, one defendant, under the employment of another defendant, who was the agent in charge of the premises, removed a brick pavement connecting the house with the sidewalk, and dug a hole near

the sidewalk into which plaintiff fell. In an action to recover for her injuries, the court instructed the jury that, if they found that the defendant who dug the hole, "entered upon said premises without the knowledge and consent of the plaintiff, or her brother or sister, and tore up the pavement of such premises, and left the hole or ditch in the way from the front door and step in such premises, and left the same unguarded and uncovered," and found other facts as to which any complaint is made, they should find for plaintiff. Held, that the instruction did not make it necessary for defendant to have proceeded to the work with the knowledge and consent of all the tenants, but if that were not the true construction, defendants were not prejudiced thereby, as they only claimed to have received plaintiff's consent. *Wentworth v. Duffy*, 68 Mo. App. 513.

(l) *Instruction requiring jury to find "wilful" instead of "gross" negligence to authorize an award of punitive damages.*

To require the jury to find "wilful" instead of "gross" negligence, in order to give punitive damages, is harmless error. *R. Co. v. Chism*, 20 Ky. L. R. 584, 47 S. W. 251.

(m) *Defendant not injured by erroneous charge requiring a finding of wilful negligence as a condition of recovery.*

In an action for personal injuries, defendant is not prejudiced by a charge defining "wilful negligence," and erroneously making a finding of such negligence a condition of recovery. *R. Co. v. Greer*, 16 Ky. L. R. 667, 29 S. W. 337.

(n) *Instruction that gross negligence and wilful negligence are the same in degree.*

In an action for injury at a railroad crossing, where

the signal not having been given, the railroad company is liable, unless the person injured was guilty of gross or wilful negligence, or acted in violation of law, an instruction that gross negligence and wilful negligence are the same in degree, if error, is harmless. *Littlejohn v. R. Co.*, 49 S. C. 12, 26 S. E. 967.

(o) *Where it clearly appears that defendant was negligent, error in instruction as to degree of care required of railroad was immaterial.*

An erroneous instruction as to the degree of care required by railroad company is not ground for reversal, where it clearly appears that the company was negligent. *R. Co. v. Miller*, 39 Kan. 419, 18 P. 486.

(p) *Instruction founded on common law negligence instead of violation of an ordinance.*

In an action against a street railway for negligent death at a crossing, an instruction based on allegations of common law negligence, whereas the charging part of the petition was composed solely on ordinance violations, was not prejudicial, where no verdict for plaintiff was authorized by it, but her right to recover was based solely on allegations as to the unlawful speed of the car, without giving signals of its approach, and of city ordinances requiring motormen to keep a vigilant watch for pedestrians. *Riska v. R. Co.*, 180 Mo. 168, 79 S. W. 445.

(q) *Instruction that if defendants were negligent in not providing intestate "with a reasonably safe place to perform his work," etc.*

In an action against an electric company for the death of an employee by throwing his arm across charged electric wires to avoid falling, which was tried on the theory that the wires were dangerous and that the only issue was intestate's knowledge of the danger, and de-

defendants' failure to warn him thereof, the court charged, that if defendants, in not providing intestate "with a reasonably safe place in which to perform his work," and he did not know or appreciate the danger, and was not warned thereof by defendants, etc., and was guilty because of the unsafe place in which he was permitted to work, and defendants failed to warn him of the danger, the jury should find for plaintiff. Held, that since the instruction required a finding of negligence in maintaining the place of work in order to authorize a verdict for plaintiff, when that was not necessary to entitle him to recover, it was not prejudicial to defendants, although it was error to submit the question of negligence in furnishing a dangerous place to work, when that was not in issue. *Poor v. Madison River Power Co.* (Mont. Sup.), 108 P. 645.

(r) *In action against a company for an employee's negligence, refusal of instruction that the company was not negligent in failing to examine him as to his competency.*

In an action against a company for an employee's negligence, any error in refusing an instruction that the company was not negligent in failing to examine the employee as to his competency, if his former employer, the company's predecessor, recommended him, was harmless, where the jury found that the predecessor did not recommend him. *Lowe v. R. Co.* (Cal. Sup.), 98 P. 678.

(s) *Where the negligence relied on was permitting a loose limb to remain, refusal to instruct that it was not the duty of the employees to cover the place where decedent stood, etc.*

Where the negligence relied on, in an action for the death of an employee was the negligence of the employer in permitting a loose limb to remain in a tree, the refusal

to charge that it was not the duty of an employer to cover the place where decedent stood when killed by the loose branch falling on him, was not prejudicial. *Warren v. Townley Mfg. Co.* (Mo. App.), 155 S. W. 850.

(t) *In action for negligent death refusal of instruction that it was unnecessary to instruct the conductor as to rules governing trains, etc.*

In an action against a railroad company for negligent death, caused by the conductor's incompetency, any error in refusing an instruction that it was unnecessary to instruct him as to the rules governing trains, if he had proved by his conduct that he understood all the rules and was competent, was harmless, where the jury found that he was incompetent, and where it did not appear that he had ever been previously placed in a situation like that confronting him at the time of the accident. *Lowe v. R. Co.* (Cal. Sup.), 98 P. 678.

(u) *Instruction to find against both defendants, if either was negligent.*

Where an injured servant sued both the master and the master's superintendent, and it appeared that the superintendent was in charge of the place where the servant was injured, and that any negligence which caused the injury was bound to be his, an instruction requiring the jury to find against both defendants, if either were negligent, was harmless error. *Chicago Veneer Co. v. Jones*, 143 Ky. 21, 135 S. W. 430.

(v) *Instruction leaving to the jury the question whether employee's injuries were due to negligence of master or of fellow servants.*

No reversible error is committed in leaving to the jury, an action for personal injuries to an employee from falling timber while digging a post-hole, with instructions,

that if the injury was due to the negligence of the master in sending men to work above the employee, the master was liable; but not if the injury was due only to the negligence of the fellow servants in their way of doing the work. *R. Co. v. Howell* (N. Y.), 224 U. S. 577, 56 L. ed. 892, affm'g judgm't, 191 F. 1006, 111 C. C. A. 674.

(w) *Instruction that if the questions of negligence and contributory negligence should be found for plaintiff, the jury should find that accident occurred at the crossing.*

Where plaintiff claimed that he was run down at a crossing, while the defendant railroad claimed that it occurred some distance away, in a wrongful attempt to jump on the train, an instruction that if the questions of negligence and contributory negligence should be found for the plaintiff, the jury should find that the accident occurred at the crossing, if error, was not prejudicial. *R. Co. v. Broderick* (Ind. App.), 102 N. E. 887.

(x) *Failure of the court to base plaintiff's right to recover on negligence of elevator operator.*

In an action against the owner of a building to recover for injuries received by a passenger riding on an elevator in such building, the failure of the court to predicate plaintiff's right of recovery on the fact that the acts of the operator of the elevator were negligent, is not ground for reversal, where the undisputed evidence of the manner in which the elevator was operated shows that the acts were, in fact, negligent. *Luckel v. Century Building Co.*, 177 Mo. 608, 76 S. W. 1035.

(y) *Instruction to find against the party to whom the jury attributed the negligence which was the proximate cause of the accident.*

An instruction in an action against a railroad company

for killing an animal at a railroad crossing, directed the jury that, if they could discriminate between the degrees of negligence of the parties, and could determine as to whose negligence was the proximate cause of the accident, they should find against the party to whom they attributed the negligence, which was the proximate cause, though erroneous, because imposing an unnecessary condition precedent to his right of recovery, was not prejudicial to defendant. *Brooks v. R. Co.*, 35 Mo. App. 571.

(z) *Rejection of material evidence of defendant's negligence where plaintiff's negligence precludes recovery.*

Where it appears, in an action against a railroad company for wrongful death, that decedent was killed by negligence which would bar his recovery, the exclusion of material and proper evidence as to the negligence of the railroad company can not be regarded as prejudicial to the party's rights. *McCarty v. R. Co.*, 20 O. C. C. 536, 11 O. C. D. 229.

(a-1) *Instruction requiring the jury to find the degree of negligence.*

In an action by the administrator of a brakeman who was injured while in the employ of appellant, appellant withdrew its answer after the close of the evidence for the appellee, and the court instructed the jury to find the degree of negligence. Held that, while it is the duty of the court to find the degree of negligence, where the facts are admitted, it is proper, in case of doubt, to submit to the jury to find the degree of negligence, and appellant was not injured by the action of the court, as the facts proven show that the conductor in charge of the train was guilty of wilful neglect of duty. *R. Co. v. Dentzel's Adm'r*, 91 Ky. 42, 12 Ky. L. R. 626, 14 S. W. 958.

Sec. 255. Promissory notes.

(a) *Maker of note, not personally served, entering appearance.*

Where, in an action on a note brought against the maker and endorsers, the maker, who was not personally served wrote a letter to the commissioner appointed to take and state an account of liens against the real estate of defendants, in which he set out the real estate belonging to him, there was evidence that the maker had notice of the suit and its object, and had opportunity to make a defense, and he was bound by its results, and the rule that the indorsers could require that the maker be brought before the court was satisfied. *Sutherland v. Bank* (Va. Sup.), 69 S. E. 341.

(b) *When defendants held liable on note, error in overruling demurrer to the reply was harmless.*

In an action against joint makers of a note, defendants answered jointly, and plaintiff replied in three paragraphs, the first being a general denial, and the second and third being limited to one only of the defendants. A demurrer to the latter two paragraphs was overruled. The complaint and the second and third paragraphs of the reply were based on papers which were proved prima facie by their production. All the other evidence was exclusively addressed to the answer and general denial. The court held both defendants liable on the note independently of the facts pleaded in the second and third paragraphs of the reply. Held, that the error, if any, in overruling the demurrer to the reply could not have prejudiced either of the defendants. *Rinehart v. Niles*, 3 Ind. App. 553, 30 N. E. 1.

(c) *Admitting note in evidence without proof of execution.*

Error in admitting note in evidence without proof of execution, after plea of non est factum is filed, is harm-

less, where the subscribing witness subsequently testified to the execution. *Thompson v. Wilkinson* (Ga. App.), 71 S. E. 678.

(d) *Admission in evidence of unindorsed note executed by testator.*

In an action for money loaned to defendant's testator, the admission in evidence of an unindorsed note, executed by testator, payable to his own order, was not prejudicial error, for the suit was not brought on the note, but for money loaned five years before the date of the note, since an unindorsed note would prove nothing. *Myers v. Weger*, 62 N. J. L. 432, 42 A. 280.

(e) *Where maker was dead, statement by plaintiff that consideration for note was stock sold.*

Where, in an action on a note, the evidence showed the execution and delivery of the note by the maker, who was dead, the admission in evidence of a statement of plaintiff that the consideration for the note was stock he sold the maker in his lifetime, was not prejudicial to defendant. *Mullikin v. Mullikin*, 15 Ky. L. R. 609, 23 S. W. 352.

(f) *Refusal to submit whether note was an individual or partnership debt immaterial where defendant liable in either case.*

Though the court erred in not submitting to the jury the question as to whether a certain note was an individual or a partnership debt, it is immaterial, where defendant would be equally liable in either case. *Brewster v. Sterrett*, 32 Pa. St. (8 Casey) 115.

(g) *Irrelevant evidence in an action on a note given by partnership.*

In an action on a note given by a partnership, which was afterwards dissolved, the remaining partner agreeing

to pay all the debts of the firm, the admission of evidence that the money for which the note was given was for defendant's personal use is harmless, the only issue being as to whether plaintiff creditor of the firm had assented to the agreement of the remaining partner to pay the debts of the firm. *Ridgley v. Robertson*, 67 Mo. App. 45.

(h) *Incompetent evidence in action on a note.*

In an action on a note, in which defendant filed a set-off for an amount alleged to be due as a commission for trading plaintiff's farm, plaintiff claimed that he made the trade himself, and testified that he went to see the person with whom he traded, and left word with his wife for him to come to plaintiff's office, and the trade was made as the result of the negotiations then begun. A witness testified for plaintiff that he went with plaintiff to the residence of the person with whom the trade was made, and introduced plaintiff to that person's wife. Held, that the evidence, if incompetent, was not prejudicial to defendant. *Sloan v. Frye*, 36 Mo. App. 523; *Kost v. Bender*, 25 Mich. 515.

(i) *Admission of evidence of settlement of note.*

In an action by an indorsee of a note, where the defense set up was, that the plaintiff was not an indorsee in good faith and for value before maturity, and that he had notice of the settlement between the indorser and defendant, the admission of evidence of such settlement, though it was made anterior to the delivery of the note to plaintiff, was not reversible error. *Gage v. Averill*, 57 Mo. App. 111.

(k) *Exclusion of instrument which was only additional evidence of indebtedness shown by note sued on.*

In an action on a note, the exclusion of an instrument which at most was only other additional evidence of the

same indebtedness represented by the note sued on, could not prejudice defendant. *Skinner v. Skinner's Ex'r*, 77 Mo. 148.

- (l) *Excluding evidence between payee of note and third persons, and as to "puts" and "calls" on Chicago Board of Trade.*

Where the evidence properly admitted showed conclusively that the transactions involved were gambling deals, the exclusion of evidence as to transactions between the payee of the note sued on and third persons as to "puts" and "calls" on the Chicago Board of Trade, and the open board of trade, could not have prejudiced plaintiff. *Bank v. Miller*, 235 Ill. 135, 85 N. E. 312.

- (m) *Permitting payee to state his purpose in surrendering note to makers.*

Where, in replevin of a note, brought by the payee against the makers, all the facts were shown by competent evidence, the error in permitting the payee to answer the question as to his purpose in surrendering the note to the makers was not prejudicial. *St. Victor v. Edwards*, 155 Mo. App. 566, 134 S. W. 1105.

- (n) *Improper to permit maker of note to testify what the president of the bank told him.*

In an action by the assignee of an insolvent, being to recover notes transferred by the bank before the assignment, it was harmless error to permit the maker of one of the notes to testify that after the assignment the president of the bank told him that defendant would be sued for the notes, and that he did not think it could hold them. *Hahn v. Penny*, 62 Minn. 116, 63 N. W. 843.

- (o) *In action against surety on a note, testimony of mortgage given to secure the same.*

An uncle was sued on a note on which he was a surety

for his nephew. He answered that the note was given in renewal of a former one, and that his signature was obtained by false representations of the payee, that certain property of the surety on the first note had been attached and judgment entered in the suit, which would be assigned to the uncle. Testimony was admitted, over objection, that about the time the first note became due, the nephew transferred all his property to the uncle by way of mortgage. The latter had already voluntarily testified with regard to the mortgage held by him, and another witness had testified in relation thereto, without objection. Held, that error in overruling an objection to the additional testimony as to the giving of the mortgages was harmless error. *Hittson v. Bank* (Tex. Sup.), 14 S. W. 993.

(p) *In suit on a note executed under marriage contract, improper introduction of contract.*

A widow, in a suit on a note executed in pursuance of a marriage contract, improperly introduced the contract in evidence upon the trial. Held that, as the note in itself imported a consideration, and as contract and note related to the same transaction, the introduction of the contract could not in any way affect the case, and that the judgment, therefore, need not be reversed. *Skinner v. Skinner's Ex'r*, 77 Mo. 148.

(q) *In action on notes, evidence of insufficiency of articles of incorporation of plaintiff company.*

Where a vendee of land assumes the payment of a mortgage thereon securing notes of the grantor to an incorporation, in an action by the corporation against the vendee on the notes, his privity with the grantor, who is estopped from denying the corporation's right to sue, and his payment of interest on the notes render the admission in evidence of insufficient articles of incor-

poration harmless error. *Stuyvesant v. Western Mort. & Ins. Co.*, 22 Col. 28, 43 P. 144.

(r) *Admitting evidence tending to limit defendant's liability on note where plaintiff recovered full amount.*

In an action by an innocent pledgee for value on a note, payable to "B" or bearer, against the maker, the admission of evidence tending to limit defendant's liability, and showing no consideration, was harmless, where judgment was ordered for plaintiff for full amount of his claim. *Bell v. Bean*, 75 Cal. 86, 16 P. 521.

(s) *In action on notes alleged to be worthless, error in not permitting the reading of warranty on back of contract, which was waived by plaintiff.*

In an action on notes given in payment for a machine alleged to be worthless, error in refusing to permit the warranty printed on the back of the order for the machine to be read to the jury is harmless, where it appears that the defendant notified plaintiff's agent that the machine would not work, and that he kept it at plaintiff's request, and that there was therefore a waiver by plaintiff of the terms contained in the warranty. *C. Aultman & Co. v. Ohl*, 28 Ill. App. 601.

(t) *In action on a note, defended on the ground of maker's alleged insanity, excluding question cured by answer to another, "That he talked as other customers did who came in to trade."*

In an action on a note, defended on the ground of the maker's alleged insanity, error, if any, in excluding a question by plaintiff to a witness, who testified to the maker's appearance and conversation about the making of the note, asking the witness to state whether the maker talked coherently, is rendered harmless by a question afterwards asked of the witness as to how the maker

talked, and his answer, that he talked as other customers did who came in to trade, and a further question as to whether he talked big, and a negative answer thereto. *Hodges v. Scott*, 118 Mass. 530.

(u) *Opinion evidence as to handwriting on a note.*

An expert being called to testify as to the handwriting on a note, defendant's counsel objected that such testimony was merely an opinion, which view the court did not sustain. Afterwards the court left it to the jury to determine the competency of the witness in question as an expert. Affirmed. *Whitmire v. Montgomery*, 165 Pa. 243.

(v) *In action on note, excluded evidence related only to what was the opinion of the defendant.*

In an action by a legatee on a note given deceased in which defendant claimed that there was no consideration, because the money for which the note was given was a gift, and also that there was no delivery, defendant's deposition was admitted containing statements that the note was given from a sentiment of delicacy to pay what she "had received" from deceased, and that when the note was given, she said to deceased that she ought to pay what she could "towards this." Plaintiff offered to show that the deposition was corrected by defendant before signing or filing, and that the original contained the word "owed" instead of "had received," and the word "debt" after the words "toward this." Held, that the chief issue on trial being that of delivery, defendant having given testimony tending to show that she regarded herself indebted to deceased, and the evidence, at most, being merely defendant's opinion, its exclusion was not reversible error. *Gasquet v. Pechen*, 143 Cal. 515, 77 P. 481.

- (x) *In action to cancel notes as forgeries, permitting testimony to genuineness of plaintiff's signature to checks.*

In action to cancel notes as forgeries, it is harmless to permit witnesses to testify to the genuineness of plaintiff's signature to checks, where no comparisons are made and the signatures are rejected as evidence. *Miller v. Dill*, 149 Ind. 326, 49 N. E. 272.

- (y) *In an action on note and plea of total failure of consideration, charge that jury should find for total purchase price or nothing.*

In an action on a note, a plea of total failure of consideration was filed, averring that it was given for the purchase of mules, that they did not fulfill the warranty made, and that they were totally worthless. Defendant's evidence tended to support the plea, while that for plaintiff tended to show that there was no failure of consideration, and there was no evidence to show any less value between the full purchase price and complete worthlessness; that though the plea of total failure of consideration includes partial failure, it was not ground of reversal that the court charged that the jury would find on such plea for the total purchase price or nothing, as, under the evidence, one or the other of such findings was absolutely required. *Ford v. Parker*, 131 Ga., 443, 62 S. E. 526.

- (z) *In action upon notes and account for money loaned, defendant answered by setting out alleged unjust charges, instruction which took from the jury consideration of such offset.*

In an action upon notes and account for money loaned, where defendant answered by a counterclaim in which he set out certain alleged unjust charges for office rent, etc., and it appears that the theory upon which defendant

claimed an offset for such charges was, that his dividends were thereby reduced, and it further appeared that defendant would not have been entitled to any dividend, even if those alleged wrongful charges had not been made, an instruction which took from the jury the consideration of such offset was not prejudicial error. *Bartholomew v. Yankee*, 30 Col. 361, 70 P. 405.

(a-1) *In an action on note for patent right territory, refusal to instruct that the intent of one party in making the contract was immaterial, etc.*

Where, in an action on a note given for patent right territory, it was impossible for the jury, under the instructions given, to pass on the controversy favorably to plaintiff, without finding that there was a meeting of minds between the parties to the contract, plaintiff was not prejudiced by the rejection of an instruction that the intent of one party in making the contract was immaterial, without the finding of a similar intent on the part of the other. *Twentieth Century Co. v. Quilling* (Wis. Sup.), 117 N. W. 1007.

(b-1) *In action on a note, instruction that if the note was given for a loan at the time, the presumption was that there was no misrepresentation.*

Where, in an action on a note, the sureties alleged that they were induced to become sureties by the fraudulent representations of the payee, and the evidence showed that the note was given for a present loan to the maker, an instruction that if the note was given for a loan at the time, and not for a renewal of a former loan, the presumption was that there was no misrepresentation in the transaction, was not prejudicial to the payee. *Bank v. Wellman & Smith* (Iowa Sup.), 119 N. W. 726.

- (c-1) *Charge that if notes were given for price of liquors, when local option law existed, the verdict should be for the maker.*

Where, in an action on notes for liquors in local option territory, the maker sought to avoid payment by showing that the liquors were bought in violation of the local option law, and the maker proved that the liquors were soft, and it was admitted that the local option law was in force, the error in charging that, if the notes were given for the price of liquors at a time the local option law was in force, the verdict should be for the maker, arising from the fact that defendant allowed the jury to pass upon the question whether the local option law was in force, was not material. *Davis v. Kuehn* (Tex. Civ. App.), 119 S. W. 118.

- (d-1) *In action on a note, charge that if, after the execution of the note, the alleged alteration was made without consent of defendant, such alteration vitiated the note.*

In an action on a note alleged by defendant to have been altered by the payee, subsequent to execution and delivery, so as to vitiate the note, there was no conflict in the evidence as to who made the alteration, all the evidence being that it was made by payee. Held, that a charge that if, after the execution of the note, the alleged alteration was made by any person, without the knowledge or consent of the defendant, the maker, such alteration vitiated the note, was not prejudicial. *Bank v. Baughman* (Okl. Sup.), 111 P. 332.

- (e-1) *In an action on a note, instruction that the presence of suspicious circumstances means bad faith.*

The error in instructing, in an action on a note, that the presence of suspicious circumstances means bad faith,

when taken in connection with other instructions covering the same subject, and the strong and conclusive evidence, is not of such prejudicial character as to warrant a reversal. *Park v. Johnson*, 20 Ida. 548, 119 P. 52.

(f-1) *Error in charging that plaintiff was entitled to recover the amount of the note, with interest.*

Under the State Constitution, art. 6, sec. 9, that "the judge shall not charge jurors with respect to matters of fact," this court has invariably held that judges are forbidden to instruct the jury upon the weight of the evidence or as to the conclusion to which it must bring their minds. The charge, therefore, to the jury, that "the plaintiff is entitled to recover the amount of the note sued on, with interest, and you will so return your verdict," is erroneous. The error in such a charge has been held insufficient to require a reversal, in cases in which the verdict and judgment were in favor of the defendant below, and it clearly appeared that the plaintiff, in no event, was entitled to recover, and the same rule would undoubtedly be applied where the verdict and judgment were in favor of the plaintiff, if it clearly appeared that the defense could, in no event, be maintained. *Jones v. Cherokee Iron Co.*, 82 Tenn. (14 Lea) 157.

(g-1) *Erroneous charge by which jury gave specie verdict for value of Confederate money, in action on a note.*

In a suit on a note dated the 7th of October, 1862, and payable on the 1st of January, 1863, the jury, under an erroneous charge, found a verdict for the plaintiff for the value of Confederate money then shown to have been the currency of the state on a specie basis, there being no legal tender notes of the United States then in circulation, with interest, on which judgment was rendered; held, that the plaintiff had recovered all he was

entitled to, and was not injured by the errors of the charge, and that the judgment should be affirmed. *Miller v. McKinney*, 73 Tenn. (5 Lea) 93.

(h-1) *Instruction in action on note for corn harvester, and defense that it was worthless.*

In an action on a note for a corn harvester, with a bundle attachment, the defense was that the carrier did not deliver within a reasonable time, but that after delivery and after trial it was found to be worthless. Notwithstanding this, the jury were instructed that, if there was a failure to deliver the harvester within a reasonable time after the sale, the buyer was not bound to take the machinery, and had the right to rescind the sale, and that if defendant did so, and offered to return the machinery and demanded the note, the verdict should be for the latter. Held that, while such instruction did not agree with the evidence, nor with any theory of the defense, and should not have been given, the error was harmless, as the jury could not have been misled by it. *Creasy v. Gray*, 88 Mo. App. 454.

(i-1) *Neglect to instruct that jury must find payee indorsed or assigned note to plaintiff.*

In an action against the estate of a deceased maker of a note, where the indorsement by the payee to the plaintiff, passed as a conceded fact in the case, and no instructions were asked on the subject offered, and the court instructed that, if the note was signed by the maker, and was not altered after the signing and delivery thereof, the jury should find for the plaintiff, it was harmless error to neglect to instruct the jury that they must find that the payee indorsed or assigned the note to plaintiff, in order to entitle plaintiff to recover. *Stillwater v. Pattin*, 108 Mo. 352, 18 S. W. 1075.

(j-1) *Error in instruction that the giving of the note made the buyer an innocent purchaser.*

Where, after a sale of debtor's stock of goods, partly for cash and partly for a note, the purchaser had been compelled to pay a judgment for such note, after a levy of an attachment by the debtor's creditors, the error in an instruction that the giving of the note constituted the purchaser an innocent purchaser, was rendered harmless, the payment of the note, after the attachment, not being a voluntary one. *Wetmore v. Woods*, 62 Mo. App. 256.

(k-1) *Where jury found holder of three notes was not a bona fide holder of two, ruling of court in withdrawing the third from their consideration, on the ground of transfer after maturity.*

When the jury found, from the evidence, that the holder of three notes was not a bona fide holder of two, the ruling of the court in withdrawing the third from their consideration, on the ground that it was not transferred until after maturity, if erroneous, was harmless. *Westinghouse Co. v. Gainor*, 130 Mich. 393, 90 N. W. 52, 9 D. L. N. 53.

(l-1) *In an action on a note, instruction using the inapt and inappropriate terms, "paid" and "payments."*

The inapt and inappropriate use of the terms "paid" and "payments," in instructions in an action on a note held harmless, where it was perfectly plain, since the defense of set-off was the only one relied on, that the judge was referring to such defense. *Youmans v. Moore* (Ga. App.), 78 S. E. 862.

(m-1) *Instruction requiring the plaintiff to prove the execution and loss of notes.*

In an action on notes, plaintiff alleged that the notes were executed and lost, and the answer denied the exe-

cution of the notes, but defendant did not deny that they had been lost. Held, that while the pleading did not warrant an instruction requiring the plaintiff to prove both the execution and loss of the notes; nevertheless, such an instruction was harmless, where the evidence was insufficient to show that the notes were executed. *Owen v. Crum*, 20 Mo. App. 121.

(n-1) *Error in instruction that verdict should be "for the amount of the note and interest, or whatever the notes provide for," is cured by a verdict for the face of the note and interest.*

In an action on a note, any error in an instruction that a verdict for plaintiff should be "for the amount of the note and interest, or whatever the note provides for," is cured by a verdict for the face of the note and interest, leaving the computation of the interest to the court, which was in fact accomplished according to defendant's contention. *Waples-Painter Co. v. Bank*, 6 Ind. Ter. 326, 97 S. W. 1025.

Sec. 256. Quantum meruit.

(a) *Jury finding on special contract, erroneous instruction on theory of quantum meruit was harmless.*

There were instructions on the theory of a special contract, and the jury found for plaintiff on such theory. Held, that no injury resulted to defendant from giving an instruction on the theory of a quantum meruit, there being no evidence of the reasonable value of the services sued for. *Lemon v. Lloyd*, 46 Mo. App. 432; *Thornton v. Moody* (Tex. Civ. App.), 24 S. W. 331.

(b) *In action on disputed contract, charge allowing recovery upon a quantum meruit.*

Where an action was brought to recover the amount

due on a contract, but the provisions of the contract, as well as the compliance of the parties therewith, were in dispute, an instruction allowing a recovery upon a quantum meruit was not prejudicial. *Runyan v. Punxsutawney Drilling & Contracting Co.*, 31 Ky. L. R. 588, 102 S. W. 854.

(c) *Instruction, in action upon express, that recovery may be had upon an implied contract.*

In an action on an express contract, instructing the jury that a recovery may be had upon an implied contract is not ground for reversal, where there is no objection to the evidence tending to show an implied contract, or as to variance between the pleading and proof. In such case the complaint may properly be regarded as amended to correspond with the proof. *Nyhart v. Pennington*, 20 Mont. 161, 50 P. 413.

(d) *In action on quantum meruit, admitting testimony as to salary paid plaintiff's predecessor.*

Testimony, in an action on a quantum meruit, as to the amount of salary paid to plaintiff's predecessor, having been admitted, and the court having instructed the jury that they were not to be bound by this as to their finding of what plaintiff's services were reasonably worth; held, that its admission was not error. *Meislahn v. Bank*, 62 App. Div. 231, affm'd, 172 N. Y. 631.

(e) *Amendment adding quantum meruit to suit on express contract.*

Defendant was not prejudiced by an order permitting plaintiff to add by amendment a count on quantum meruit to his original suit pleading an express contract, where plaintiff's recovery was based solely on the express contract as originally pleaded. *Davis v. Drew*, 129 S. W. 255, 114 Mo. App. 174.

Sec. 257. Replevin.

(a) *Error in service of summons and writ of replevin.*

The errors relating to the service of summons and service of writ of replevin set forth, and held insufficient to require a reversal of the case. *Nipp v. Bower*, 9 Kan. App. 854, 61 P. 448.

(b) *Error in refusing to quash return in replevin.*

Where the bond in replevin taken by the sheriff was found to be inapplicable to his return, which was correct, and the court refused to quash the return and dismiss the suit, and the verdict was for plaintiff at the trial on the merits, the court refuses to reverse the final judgment, though the return ought to have been quashed, as defendant did not suffer from the error. *Hicks v. Stull*, 50 Ky. (11 B. Mon.) 53.

(c) *Alleged invalid writ of replevin did not affect proceedings thereunder.*

An alias writ of replevin was issued for the remainder of certain goods described in the first writ, and plaintiff recovered judgment. Held that, even if the alias writ was invalid, the subsequent proceedings up to the judgment must be sustained as being in accordance with the provisions of the statute, and defendant can not complain, since the judgment is the same as would have been rendered had no alias writ been issued. *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191.

(d) *Irregularity in the issuance of the bond in replevin.*

In replevin, an irregularity in the issuance of the bond on which the property was delivered to plaintiff, after verdict for plaintiff and judgment thereon, will not be considered on appeal, as, if error at all, it is without prejudice. *Pistorious v. Swarthout*, 67 Mich. 186, 34 N. W. 547.

- (e) *Admission of evidence of special damages to defendant from replevin.*

Error in the admission of evidence of special damages to defendant from the replevin is harmless, where the jury's finding confines the damages to the value of the property. *Mason v. Patrick*, 100 Mich. 577, 59 N. W. 239.

- (f) *In replevin, admission of unsigned agreement.*

In replevin to recover property delivered to defendant under a contract which defendant subsequently refused to execute, the admission in evidence of the agreement as proposed for defendant's signature, and which he refused to sign, was not prejudicial to defendant, it being introduced, not for the purpose of showing an agreement, but for the purpose of showing that there had been no agreement. *Broome v. Wright*, 15 Mo. App. 406.

- (g) *In replevin for portion of goods transferred in fraud of creditors, defendant not prejudiced by refusal to permit her to be asked whether she knew when she took the goods that insolvency was contemplated.*

In replevin for a portion of a stock of goods transferred to defendant in fraud of creditors, defendant was not prejudiced by a refusal to permit her to be asked whether she knew when she took the goods that insolvency was contemplated, when she had already testified that she did not know that the debtor was insolvent, and that she made no inquiry into her financial condition, but supposed that the business was "going good." *Seligman v. Armando*, 94 Cal. 314, 29 P. 710.

- (h) *Want of affirmative proof of venue in replevin is error without merit.*

Where, in an action to recover possession of goods and chattels, it is alleged in the declaration that the property was detained in Taylor county, and there is no plea deny-

ing that fact, and no evidence showing it was not detained in that county, an assignment of error based on the absence of affirmative proof of that fact can not be sustained. *Williams v. Hampton*, 57 Fla. 272.

- (i) *Overruling motion to withdraw all the testimony as to ownership in a replevin case.*

The overruling of a motion to withdraw all the testimony of the plaintiff relative to his special ownership of the property sued for in a replevin action, in which the petition alleged general ownership, is not necessarily prejudicial to the defendant. Such evidence, in the absence of amendment to the petition, tends to defeat the plaintiff, not to sustain him. *Bank v. Parkhurst*, 54 Kan. 159, 38 P. 477.

- (j) *Admitting evidence of the value of the property in a replevin action.*

Where a petition in an action of replevin fails to state the value of the property in controversy, but alleges that defendant detained it for one day, to plaintiff's damage in the sum of \$500, and the affidavit for the writ of replevin states that the property is worth \$600, and defendant's forthcoming bond recites that the plaintiff claimed that the property was worth \$600, the reception of the evidence showing the value of the property in controversy is harmless error. *Knox v. Noble*, 25 Kan. 449.

- (k) *Evidence as to execution of replevin bond.*

Where, in an action on a replevin bond, the declaration counts on the bond, and the question of the execution is not raised by affidavit, errors in the admission of evidence establishing the execution of the bond, together with the bond itself, are harmless. *Jennison v. Haire*, 29 Mich. 207.

- (l) *In action of replevin for a buggy, admitting testimony that plaintiff's son had previously offered to sell the same.*

In an action of replevin for a buggy which defendant had taken from plaintiff's barn, plaintiff rested his right to recover on the ground that it was in his possession at the time it was taken. The defense rested on the contention that it was at the time in the possession of plaintiff's son who lived with him. Held, that testimony that plaintiff's son had previously offered to sell the buggy, while not tending to show actual ownership, did tend to show a portion of ownership, and, as other testimony to the same effect had been received, without objection, there was no prejudice to plaintiff. *Woolston v. Smead*, 42 Mich. 54, 3 N. W. 251.

- (m) *In action of replevin by wife, exclusion of judgment against plaintiff's husband.*

Under an execution on a judgment against plaintiff's husband, a levy was made on his goods by defendant, a constable. Plaintiff claimed certain of the goods as her property, and under a writ of replevin the entire lot was taken, property not covered by the writ being included. The court expressly charged that plaintiff could recover only such things as she proved to be her property. Held, that the exclusion of the judgment against the husband, on the ground that it was void, because he was described therein by his initials only, was error without prejudice. *Vickborn v. Pollock*, 133 Mich. 524, 95 N. W. 576, 10 D. L. N. 292.

- (n) *In replevin, evidence that subsequent to institution of suit plaintiffs presented a portion of their claim to the assignee for allowance.*

In an action of replevin by the vendor of goods against the assignee of the purchaser, on the ground of false and

fraudulent representations of the purchaser in obtaining the goods, it was error to admit proof that subsequent to the institution of the suit plaintiffs presented to the assignee for allowance a portion of their claim, but such error was rendered non-prejudicial by the production by plaintiffs of the demand itself, showing that it was for the conversion of the remainder of the goods sold, credit having been given for the value of the goods which had been replevied. *Burnham v. Ellmore*, 66 Mo. App. 617.

(o) *Harmless erroneous instruction in action for replevin.*

Where, in replevin, the court instructed the jury that, if the defendant was in possession of the goods at the time of the issuance and service of the order of delivery, the verdict must be for plaintiff, that the goods were in defendant's possession at the time the order of delivery was issued; the defendant can not complain that the instructions were misleading and confusing, the first one being prejudicial to plaintiff in requiring defendant to have been in possession when the order was served. *Goldsmith v. Taussig*, 60 Mo. App. 460; *Berry v. Wilson*, 64 Mo. 164; *Sandler v. Bresnahan*, 53 Mich. 567, 19 N. W. 188.

(p) *In replevin, charge that in the absence of acquiescence by plaintiff, anything done by the execution debtor was not binding on plaintiff.*

Where, in replevin by a third person for property seized under an execution, the evidence showed that plaintiff claimed the property, and that the execution debtor claimed exemptions therein, with the knowledge, consent and approval of plaintiff's attorney, the action of the court in inquiring of the attorney his theory of the right of the execution debtor to an exemption, and in charging the jury that, in the absence of acquiescence by plaintiff or his representative, anything done by the ex-

ecution debtor was not binding on plaintiff, was not prejudicial to plaintiff. *Grand Rapids Brewing Co. v. Pettis*, 159 Mich. 679, 124 N. W. 577, 16 D. L. N. 1051.

(q) *Where the actual owner of goods placed them in possession of another, charge in replevin that jury should find against actual owner.*

Where the actual owner of goods placed in possession of another, and knowingly allowed him to hold himself out as their owner, and a third person took a mortgage on the goods, believing, in good faith, that the owner in possession was the owner, and an officer levied a distress warrant thereon at the suit of the mortgagee, and the actual owner replevied the goods and converted them, a charge that the jury should find against the actual owner replevying the goods, if they believed from the evidence that the mortgagor owned the goods and had the right to mortgage them, was not reversible error. *B. F. Avery & Sons v. Collins* (Tex. Civ. App.), 131 S. W. 426.

(r) *Harmless irregularity in a verdict in replevin.*

Where a verdict in replevin finds for the defendant as to a portion of the property, the omission to describe therein the portion to which the defendant is entitled to have returned is error, without prejudice, when it is disclosed that all of the property seized under the replevin writ has been destroyed by fire. *Richardson Drug Co. v. Teasdale*, 59 Neb. 150, 80 N. W. 488.

(s) *In action of replevin, defeated defendant can not maintain on appeal that replevin will not lie against him without demand and his refusal to deliver up the property.*

Where the defendant, in an action of replevin before a justice of the peace, has contested the case upon the merits, on a claim of superior right to the property, and a judgment has been given against him, he can not main-

tain on appeal in the supreme court that, as an innocent purchaser, replevin will not lie against him, without a demand and his refusal to deliver up the property. *Lamping v. Keenan*, 9 Col. Sup. 390, 12 P. 434.

- (t) *One wrongfully selling replevined property for more than the judgment not prejudiced by defendant's failure to prove the value.*

One wrongfully replevining property, which he admitted selling for a sum greater than the judgment rendered against him for its value, is not prejudiced by defendant's failure to prove the value. *Keystone Implement Co. v. Welsheimer*, 8 Kan. App. 861, 55 P. 348.

- (u) *In action of replevin, judgment for plaintiff not disturbed because of ruling that contract transferred title to buyer.*

A contract for the sale of a commodity stipulated that the title should remain with the vendor, subject to his directions, until the conditions of the contract were fulfilled. Held, in an action of replevin by one claiming in good faith under the buyer against the agent of the vendor, who had taken possession, without a previous demand, the judgment in favor of plaintiff would not be disturbed because of a ruling that the contract transferred the title to the buyer, in the absence of any showing that the seller had taken any steps to declare the contract void, whether the ruling be correct or not. *Giddy v. Altman*, 27 Mich. 206.

Sec. 258. Seduction.

- (a) *In action for seduction, instruction that plaintiff should be allowed such damages, "as you find under the testimony will fairly compensate her for loss of time."*

An instruction in a civil action for seduction that plain-

tiff should be allowed such damages as "you find, under the testimony, will fairly compensate her for . . . and loss of time, if any, caused thereby," was not prejudicial to defendant, even if there was no evidence of plaintiff's loss of time from being seduced. *Fisher v. Bolton* (Iowa Sup.), 127 N. W. 979.

Sec. 259. Title to land.

(a) *In action to recover land, admission of evidence as to a part of plaintiff's title.*

In action to recover land, any error in the admission of evidence as to a part of plaintiff's title is harmless, where another part is properly proven, and defendants failed to show any title, since sufficient title is shown in plaintiff to recover against defendants under such circumstances. *Davis v. Mills* (Tex. Civ. App.), 133 S. W. 1064.

(b) *On issue whether plaintiffs were the legitimate children of owner of land and his reputed wife, admission of declarations of woman that neither she nor her children could have any rights in the land.*

On the issue whether plaintiffs were the legitimate children of the owner of land and his reputed wife, the admission of declarations of the woman that neither she nor her children could have any rights in the property, while error, were harmless, where the jury found that plaintiffs were not the children of the owner and his reputed wife, and under instructions did not answer the other questions submitted. *Walker v. Walker* (N. C. Sup.), 65 S. E. 923.

(c) *In action to recover land, error in complaint describing one of the lots as "52" instead of "54."*

In an action to recover land, a clerical error in the complaint, in that it described one of the claimed lots

as "52" instead of "54," was harmless. *Stephens v. Long*, 92 S. C. 65, 75 S. E. 530.

(d) *Error in excluding tax receipts to prove ownership of land.*

In trespass to land which defendant claimed by adverse possession, the court admitted tax receipts for five years, showing payment of taxes by defendant on a part of the land, but erroneously rejected receipts for two other years. The court charged that defendant claimed that during six or eight years he paid taxes, which was competent and powerful evidence to prove ownership. Held, that the error was harmless. *Merwin v. Morros*, 71 Conn. 155, 42 A. 855.

(e) *Admitting check of plaintiff by which he paid for land in question.*

In an action for misrepresenting the quality of land sold, error in admitting a check whereby plaintiff paid part of the price was harmless error, where the answer admitted its receipt. *Wicks v. German Loan & Inv. Co.* (Iowa Sup.), 129 N. W. 744.

(f) *Instruction that plaintiff need not show right to possession.*

An erroneous instruction that plaintiff need not show right to possession held harmless, where he did show it. *Pratt v. Prentice*, 151 N. Y. Supp. 259.

(g) *In action for the possession of land, charge that if jury found plaintiff and defendant claimed from a common source, and that plaintiff had shown a better claim of title, etc.*

In an action for the possession of land, the judge charged that if the jury found that plaintiff and defendant claimed title to the land in dispute from a common

source, and that plaintiff had shown a better claim of title, he should recover. There was no evidence that they claimed title from a common source. Held, in the absence of any showing of prejudice, that it would be considered harmless error. *Bryan v. Donnelly*, 87 S. C. 388, 69 S. E. 840. .

(h) *Instruction to find for defendant, if he acted on statements and representations of plaintiff in the purchase of the land. .*

One of the particular issues presented was that arising from the allegations of the defendant in his answer, that the plaintiff, in order to induce defendant to purchase land, assured him that, at the expiration of four years from the date of the conveyance thereof, he, the defendant, would have absolute title in fee simple, and there being evidence tending to prove that plaintiff made such an assurance to the defendant before and at the time of the conveyance of the land by plaintiff's father to the defendant; also, that before and at the time of making such assurance, the plaintiff was the general adviser of the defendant. Held, that an instruction which contained words to the effect that if the jury should find that the defendant, in the purchase of said land acted upon the said statements and representations of the plaintiff, "believing what plaintiff said and represented to him, the defendant, was true, and relied upon and acted upon said representations of plaintiff, as his legal adviser, then you are instructed that the plaintiff can not recover in this action," if error, which is not decided, was error without prejudice to the plaintiff, the making of such statements by plaintiff to defendant, while acting as the agent of defendant grantor, being sufficient ground for estoppel, whether or not plaintiff was the legal adviser at such time of defendant. *Wise v. Newatny*, 26 Neb. 88, 42 N. W. 339.

- (i) *In action of unlawful detainer, statement in judgment that defendant held fee simple title.*

The only matter in issue in an action of unlawful detainer is the right of possession, and therefore the declaration of the court, in its judgment, that defendant had the fee simple title, can not prejudice the rights of the parties in any proceedings involving the title to said land. *Morris v. Deane*, 94 Va. 572, 27 S. E. 432.

Sec. 260. Trespass and trespassers.

- (a) *In action for damages from trespassing, instruction that it was the duty of all persons to take notice of stones and marks of government survey, etc.*

An instruction, in an action for trespassing on plaintiff's land with sheep and driving his stock therefrom, that it was the duty of all persons to whom notice of stones and marks of government surveys, and the fact that plaintiff had not otherwise marked the boundaries would not authorize defendant to trespass thereon, could not have prejudiced defendant, where the evidence showed that defendant and his employees were acquainted with plaintiff's land, and it was not claimed that they were thereon by mistake. *Henderson v. Coleman* (Wyo. Sup.), 115 P. 439, rehear. den. Id. 1136.

- (b) *In action of trespass, erroneous charge as to malice was not prejudicial.*

Where the damages of trespass are expressly limited to the actual loss, a reference in the charge to malice is not prejudicial. *Keables v. Christie*, 47 Mich. 594, 11 N. W. 400.

- (c) *In action of joint trespass, error to instruct the jury to sever the damages, but not disadvantageous to defendant.*

Although, in a general action of trespass against sev-

eral who pleaded guilty, if the jury find them guilty jointly, they should assess the damages jointly against all, and should assess against all who are found guilty the amount which they think the most guilty ought to pay, and it is error for the court to instruct the jury to sever the damages, and assess, respectively, what, in their opinion, each to be found guilty ought to pay; yet, the error is not one of which a defendant may complain, it not being to the disadvantage of any defendant. *Crawford v. Morris*, 5 Grattan (Va.) 90.

(d) *Refusal to charge that projection of eaves did not constitute trespass.*

In an action of trespass, where it was found that defendant's house encroached fourteen inches on plaintiff's lot, and the verdict was for only six cents damages, refusal to instruct that the projection of the eaves did not constitute trespass, is harmless error. *Bureau v. Marshall*, 55 Mich. 234, 21 N. W. 304.

(e) *In trespass, instruction characterizing same as "wilful and negligent."*

Where, in trover for timber cut from plaintiff's lands, punitive damages are not allowable under a charge of the court, an instruction characterizing the alleged trespass as "wilful and negligent" is not prejudicial. *Moret v. Mason*, 106 Mich. 340, 64 N. W. 193.

(f) *In trespass to try title, defendant claimed under administrator's sale, admitting report of sale without order authorizing same.*

Where, in trespass to try title, defendant claimed under an administrator's sale, error in admitting report of sale, because made without an order authorizing the sale, would not be ground for reversing the judgment for defendant, since the proceeds having been used to pay

decident's debts, the purchaser was subrogated to the rights of the creditors, and could retain possession until payment of the purchase price and interest. *Millwee v. Phelps* (Tex. Civ. App.), 115 S. W. 891.

(g) *In trespass to try title, refusal to grant continuance to bring in heirs of deceased plaintiff unprejudicial.*

In trespass to try title by several tenants in common, the refusal to grant a continuance to bring in the heirs of a deceased plaintiff, is not ground for reversal, the judgment provided that the rights of such heirs should not thereby be prejudiced. *Wallace v. Byers*, 14 Tex. Civ. App. 574, 38 S. W. 228.

(h) *In action for assault and trespass, plaintiff proved her nervous condition after it was over, and that the doctor administered morphine hypodermically.*

In an action for assault and trespass, plaintiff proved, without contradiction, her highly excited nervous state, after it was over, and that the doctor, whom she sent for, administered medicine hypodermically, and testified that he said it was morphine. Held that, even if it was error to admit his statement in evidence, it was harmless, it being evident that the medicine given was sedative, and wholly immaterial what its exact nature was. *Saunders v. Gilbert*, 156 N. C. 463, 72 S. E. 610.

(i) *Erroneous declaration for trespass vi et armis, when the action should have been in case.*

Where there has been a fair trial in the lower court, and it clearly appears that no injustice has been done to the defendant, the court will not reverse the judgment on the ground that the plaintiff declared for a trespass vi et armis, when he should have declared in case. *Palmer v. Jordan*, 2 Ky. Dec. 143.

- (j) *In action against railroad for trespass, improper evidence of an offer for the land, and refusal to order it stricken out.*

Where an expert witness, on trial of an action against an elevated railroad for trespass, states that the property at one time, before the construction of the road, was valued at \$30,000, and that he had submitted an offer for that amount, it is not reversible error to refuse to strike out that portion of the answer relating to the submission, it not appearing that the testimony in any way affected the result. *Ross v. R. Co.*, 57 N. Y. Super. Ct. (25 Jones & S.) 412, 8 N. Y. Supp. 495.

- (k) *Competency of testimony that trespass was wilful and malicious was immaterial where jury awarded no exemplary damages.*

The competency or materiality of testimony offered to show that the trespass was committed wilfully and maliciously is immaterial, where the jury awarded no exemplary damages. *R. Co. v. Willets*, 45 Kan. 110, 25 P. 576.

- (l) *It was immaterial error to show that porters on trains generally are authorized to eject trespassers therefrom.*

In an action for damages caused by defendant's porter ejecting plaintiff from a train, where it was shown that porters on defendant's road had authority to eject trespassers from trains, the fact that it was also shown that such authority was general on all roads is immaterial. *R. Co. v. Huffman* (Tex. Civ. App.), 32 S. W. 30.

- (m) *Erroneous admission of evidence fixing false basis for computing damages for trespass.*

Error in admitting the evidence fixing a false basis for the computation of damages for a trespass to property

was not prejudicial to defendant, where the amount awarded by the verdict fell short of the damages computed on a correct basis. *Robertson v. Cleveland & A. Mineral Land Co.*, 70 Mo. App. 262.

(n) *In action for alleged wanton shooting of trespasser, instruction requiring such finding to warrant awarding punitive damages.*

In an action for an alleged wanton shooting of trespasser on defendant's premises in the night-time, and was making a noise there, a charge as to punitive damages, where the jury must have understood as making it necessary to find that the shooting was done wantonly, or plaintiff would not be entitled to recover any damages, is not prejudicial. *Palmer v. Smith* (Wis. Sup.), 132 N. W. 614.

Sec. 261. Usury.

(a) *Where the judgment was correct, an erroneous instruction on the question of usury was immaterial.*

Where a judgment was proper, irrespective of the question of usury in the transaction, error in an instruction as to usury was harmless. *Boylston v. Bain*, 90 Ill. 283.

(b) *Failure to allow alleged claim for usury was not prejudicial.*

Where a bank sued the maker of a note, and it appeared that he was insolvent and had, at the time, a large overdraft, and the same was referred to a special commissioner to settle the accounts between the parties, and the evidence showed that, after allowing defendant all credits, he was overdrawn, at the maturity of the note, for about \$6,000, failure to allow an alleged claim for usury for \$234 was not prejudicial. *Lee v. Grant Co. Deposit Bank*, 25 Ky. L. R. 1208, 77 S. W. 374.

Sec. 262. Warranty.

- (a) *Not prejudicial error to strike call for non-resident warrantor.*

In a petitory action for a slave, defendant called in warranty a non-resident warrantor and prayed the appointment of a curator ad hoc; it was not shown that the warrantor had property in the state, and the call in warranty was stricken from the answer. The only effect of the call would have been judicial notice to the warrantor of the pendency of the suit, which he might have defended had he chosen to do so. Plaintiff could have accomplished the same result by notice sent by himself. Held, that there was no reversible error. *Smith v. McWaters*, 7 La. A. 145.

- (b) *Errors confined to breach of warranty harmless where judgment based on settlement.*

Where, in an action on notes given for the difference in an exchange of engines, in which defendant pleaded a breach of warranty, and also a settlement, and testified that the judgment was based exclusively on the evidence of the settlement, errors referring exclusively to the breach of warranty were harmless. *Robinson & Co. v. Hill*, 23 Ky. L. R. 2095, 66 S. W. 623.

- (c) *Excluding question whether defendant had ever made any claim under warranty clause that goods were not like those ordered.*

In an action for the purchase price of goods, error in excluding a question whether defendant had ever made any claim under a warranting clause, as required by the contract, as a condition precedent to asserting that the goods were not like those ordered, became immaterial when the jury were instructed that no claim had been made under that clause of the contract. *Price v. Rosenberg*, 200 Mass. 36, 85 N. E. 887.

(d) *Harmless erroneous evidence in action for breach of warranty.*

Where, in an action by a buyer for breach of warranty, evidence is erroneously admitted of negotiations prior to the written contract of sale tending to show warranty, but the judgment of the lower court is apparently not founded upon such prior negotiations, but upon the written contract which has been received in evidence, admission of such evidence is not prejudicial to defendant. *Jackson v. Helmer*, 73 App. Div. 14, 77 N. Y. Supp. 835.

(e) *Verdict for defendant on warranty of horse upheld.*

A verdict in favor of the defendant for recovery on a warranty by him of a horse sold to the plaintiff, will not be set aside, where the evidence was such that the jury might, without bias or prejudice, but in the exercise of a sound judgment have reached the conclusion that the horse was not "sweenied" at the time of the sale. *Palmer v. Cowie*, 7 O. C. C. n. s. 46, 17 O. C. D. 617.

(f) *In action for breach of warranty of a horse, instruction that the measure of damages was the difference between the price paid and the reasonable value of the horse for any purpose.*

Error in an action for breach of warranty of a horse sold, charging that plaintiff's measure of damages was the difference between the price paid and the reasonable value of the horse for any purpose, when the measure was the difference between its actual value at the time and place of sale and its value at the same time and place had it been as warranted, was not prejudicial to defendant, where there was no competent evidence offered tending to show that the specific value of the horse at the time and place of sale was different from the pur-

hase price. *Brahamson v. Cummings* (Wash. Sup.).
17 P. 709.

- g) *Instruction imposing on seller the burden of showing that there was no warranty, and that horses must be tried before taken away.*

In an action for the price of a horse, which included guaranty that the horse was sold under a warranty, one instruction imposing on the seller the burden of showing that there was no warranty, and that it was announced that horses sold must be tried on the premises before being taken away, was not prejudicial to the buyer. *Stephens v. Brill* (Iowa Sup.), 140 N. W. 609.

Sec. 263. Wills.

- (a) *In will contest, allowing witness to give opinion that testator's degree of religious faith, persistency and conduct was evidence of an insane mind.*

In a will contest, it was not prejudicial error to allow a witness to give an opinion that testator's degree of religious faith, persistency and conduct was evidence of insane mind, where witness had previously detailed testator's conduct, and had, without objection, given an opinion that testator was of insane mind. *McReynolds v. Smith* (Ind. Sup.), 86 N. E. 1009.

- (b) *Admitting statements made by testator, in will contest, as evidence of undue influence.*

Though it was error in a will contest case to admit statements of testator as evidence of undue influence in the execution of the will, it was harmless, where the jury also found sufficient evidence that testator was insane at the time of the execution of the will. *In re Jones's Est.* (Cal. Sup.), 135 P. 288, 293.

- (c) *In will contest, witness testifying to spiritualistic affiliations of contestant.*

In a proceeding for probate of a will, a witness testified, without objection, that contestant attended spiritualistic meetings at witness's house, and another of contestant's witnesses, on being asked if she was a spiritualist or spiritualistic medium, answered in the negative. Contestant, when asked if he had written a book on spiritualism, answered in the negative. It did not appear but that the statement of the last two witnesses were accepted as true, or that any argument was made to the jury on the subject of the religious belief of any of them. Held, that such evidence was not prejudicial to contestant, as an appeal to religious prejudice in violation of Comp. Laws, sec. 10,207, providing that no person should be incompetent to testify on account of religious opinion, nor should he be questioned with reference thereto. *Sibley v. Morse*, 146 Mich. 463, 13 D. L. N. 878, 109 N. W. 858.

- (d) *Testimony of physician as to whether it was delirium for testatrix to ask someone to get a lawyer to make her will.*

The admission of the testimony of a physician as to whether it was evidence of delirium, that a testatrix should tell those around her that she wanted someone to go and get someone to make a will for her, is not prejudicial, since it is common knowledge that it would be evidence of the absence of delirium. *McHugh v. Fitzgerald*, 103 Mich. 21, 61 N. W. 354.

- (e) *Errors in instructions in will contest, where the evidence is conclusive in favor of successful party.*

Where, in a will contest, the evidence is so conclusive for the successful party that, if the verdict had been for

the other, it would necessitate the court setting it aside as against the evidence, there could be no reversal for errors in the instructions. *Bohlsen v. Bohlsen*, 5 Ky. L. R. (abst.) 613.

(f) *Improper admission of will in evidence in action against estate for services rendered.*

Plaintiff sued decedent's estate for services rendered under a promise to provide for plaintiff in decedent's will. It was admitted that the will contained no provision for plaintiff; nevertheless, the will was admitted in evidence. The will showed a failure to provide for certain persons supposed to be natural objects of testatrix's bounty. It disclosed an estate of considerable magnitude, but gave no certain evidence of its amount. The court instructed that the fact that testatrix might have left a large estate should not influence the verdict. Held, that the introduction of the will was harmless error. *Bonebrake v. Tauer*, 67 Kan. 827, 72 P. 521.

(g) *In a proceeding to probate a will, evidence by disinherited son that he resembled the testator.*

Where, in a proceeding to probate a will contested by the son of testator, substantially disinherited by the will, on the ground of testamentary incapacity and undue influence inducing a belief in the mind of the testator that the son was not his own child, the fact that the son was testator's son was conclusively established, the error, if any, in permitting him to prove that he resembled testator was not prejudicial. *O'Dell v. Goff*, 149 Mich. 152, 112 N. W. 736, 10 L. R. A. n. s. 989, 14 D. L. N. 399.

(h) *Harmless improper evidence that will was not read to subscribing witnesses or to testatrix's daughter.*

The jury having found the will invalid, on the ground

of testatrix's unsound mind alone, improper admission of evidence that the will was not read to the subscribing witnesses or to testatrix's daughter is harmless. *Staggenborg v. Staggenborg*, 25 Ky. L. R. 1073, 77 S. W. 173.

- (i) *Testimony relevant only to undue influence, not an issue in the case.*

The only issue being on the competency of the testator, the admission of evidence pertinent to the issue of undue influence, but irrelevant to that of testamentary capacity, is not ground for a reversal of the judgment. *Daniel v. Daniel*, 39 Pa. St. (3 Wright) 191.

- (j) *Argumentative instruction as to right of testator to dispose of his estate as he pleased.*

An argumentative instruction as to the right of a testator to dispose of his estate as he pleased, was not prejudicial to contestants, where there were no children, and the estate devised by testator to his wife, the principal devisee, was substantially the product of their joint efforts, there being no violation of testator's natural or moral obligations. *Folks v. Folks*, 107 Ky. 561, 21 Ky. L. R. 1275, 54 S. W. 837.

- (k) *In a will contest, instruction employing the word "credible" in referring to the character of the subscribing witnesses.*

In a will contest, there was no evidence tending to show that the subscribing witnesses were not credible, the error in an instruction because of the use of the word "credible" with reference to the character of the subscribing witnesses, was not prejudicial. Rehearing, 76 S. W. 361, 25 Ky. L. R. 763, denied. *Savage v. Bulger*, 25 Ky. L. R. 1269, 77 S. W. 717.

- (l) *In suit to set aside the probate of a will, refusal to charge that the declarations of testator were not proof that his son and a third person managed his business.*

Where, in a suit to set aside the probate of a will, on the ground of testamentary incapacity, the court admitted declarations of testator that his farm was managed by his son, and that his business elsewhere was managed by a third person, but excluded evidence that the son had managed testator's business on the farm, and announced, in the presence of the jury, that such proof was immaterial and incompetent, and there was evidence of business transacted by testator in connection with his business on the farm, the refusal to charge that the declarations of testator were not proof that his son and a third person managed his business, or that he did not attend to it himself, was not prejudicial, in the absence of any instruction directing the attention of the jury to any statement made by testator as to the management of his business. *Healea v. Keenan*, 244 Ill. 484, 91 N. E. 646.

- (m) *In action to contest a will, charge that if the testator "at the time he had his will prepared was of sound mind, but afterwards was stricken with disease," etc.*

In an action to contest a will, an instruction that if the testator, "at the time he had his will prepared was of sound mind, but afterwards, and before the will was signed, he was stricken with disease, then, I charge you, if he had mind enough at the time the will was signed and witnessed to know the business in which he was engaged, and that he was signing the will he had already prepared, then, I charge you, the will is not invalid, on the ground of unsoundness of mind," while too narrow, is harmless, where it was shown that the testator had

frequently declared during his life his intention to make such disposition of his property, and on the evidence and special findings of his testamentary capacity, the only issue could not have been determined differently if such instruction had been in correct terms. *Terry v. Davenport*, 83 N. E. 636, 170 Ind. 743.

- (n) *Instruction that if deceased had died, without a will, her estate would descend to her children equally.*

Where the jury were emphatically instructed that the will in controversy could not be set aside, because it was not in accordance with the law of succession, or was unjust or capricious, proponents were not prejudiced by an instruction that, if deceased had died without a will her estate would descend to her children equally. *In re Snowball's Est.* (Cal. Sup.), 107 P. 598.

- (o) *In a will contest, it was not prejudicial error to emphasize in an instruction the things which might be considered in sustaining a will.*

Where the whole question in a will contest was as to the testatrix's mental capacity, it was not prejudicial error to emphasize in instructions the things which might be considered in sustaining the will. *In re Kahn's Est.* (Iowa Sup.), 113 N. W. 563.

- (p) *Instruction in will contest, when witnesses are equally credible, giving greater weight to affirmative and those having best means of information.*

Where, in a will contest, the witnesses for both parties who testified to material matters, swore affirmatively, and the only conflict was in regard to the inference that was to be drawn from the events and transactions testified to, proponents were not harmed by an instruction that when witnesses are otherwise equally credible,

greater weight and credit should be given to those whose means of information were superior, and to those who swear affirmatively to the fact, rather than to those who swear negatively or to a want of knowledge. *Dillman v. McDaniel*, 222 Ill. 276, 78 N. E. 591.

(q) *In will contest, refusal to require contestants to file a statement of the grounds of contest.*

Where, in proceedings for the probate of a will, the contestants relied on want of testamentary capacity and undue influence, and the greatest latitude was allowed the parties, the refusal to require contestants to file a statement of the grounds of contest, as required by the propounder, was not reversible error. *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

CHAPTER X.

SUITS IN EQUITY AND EQUITABLE RIGHTS.

- Sec. 264. Accounting.
- 265. Arbitration and award.
- 266. Decree.
- 267. Equity.
- 268. Injunction.
- 269. Liens.
- 270. Mistakes.
- 271. Mortgages.
- 272. Nuisances.
- 273. Partition.
- 274. Quiet title.

Sec. 264. Accounting.

- (a) *Where there was nothing in the pleadings and proof to make an accounting necessary, its granting was harmless.*

Where there is nothing in the pleadings and proofs to make an accounting proper, but the court improvidently grants a reference, it is harmless error. *Breese v. Bradfield*, 99 Va. 331, 3 Va. Sup. Ct. Rep. 215, 38 S. E. 196.

- (b) *Admission of defendant's account book was harmless.*

The admission of defendant's account book is harmless error, where, after refreshing his recollection thereby, he is able to testify of his own knowledge that entries therein are correct, and where witnesses for both parties gave testimony tending to show the correctness of the same. *Brown v. Weightman*, 62 Mich. 557, 29 N. W. 98.

- (c) *Complainant not prejudiced by refusal to allow an accounting.*

A complainant is not prejudiced by the refusal to allow an

accounting for disbursements, in an action to establish a trust in realty, where the value of the use and occupation of the premises exceeds the expenditures for improvements. *Doll v. Gifford*, 13 Col. App. 67, 56 P. 676.

(d) *Testifying to account without introducing books, cured by their production subsequently.*

In an action to enforce a mechanic's lien, where plaintiff, instead of introducing his books, testifies to the account, though some of the sales were made by his employees, the error is harmless where the books are subsequently brought into court, though not formally introduced in evidence, and found to correspond with plaintiff's testimony. *McGarry v. Averill*, 50 Kan. 362, 31 P. 1082, 34 Am. St. R. 120.

(e) *Refusal of instruction that an account stated by one's bookkeeper is not necessarily so against the principal unless authority was conferred.*

Defendant's employee, by whom an account was stated, having been not merely his bookkeeper, but virtually his manager or personal representative in the transaction concerning which the account was stated, it was not prejudicial to refuse an abstractly correct requested instruction that an account stated between his bookkeeper, is not necessarily an account stated against the principal, and is not so, unless such authority is conferred on him, or his act is ratified by the employer. *Gutshall v. Cooper* (Col. Sup.), 109 P. 428.

Sec. 265. Arbitration and award.

(a) *Award stands though there be no declaration filed.*

A judgment on an award will not be reversed on appeal if no declaration was filed in the case. *Dorsey v. State*, 3 Harris & McHenry (Md.) 388.

(b) *Erroneous award of portion of fund to claimant.*

The award of a portion of a fund to a claimant other than

appellant, though erroneous, is not the subject of complaint, if there be other claimants rightfully awarded a prorate from the payment sufficient to exhaust the funds. *Munroe v. Sedro Lumber Co.*, 16 Wash. 694, 48 P. 405.

- (c) *Charge deficient in not instructing the jury to base their award upon what they might find from the evidence not ground for reversal.*

An instruction upon the question of damages, which was deficient in not instructing the jury to base their award upon what they might find from the evidence was not ground for reversal. *Suehr v. Sanitary Dist. of Chicago*, 149 Ill. App. 328, judg. affm'd, 90 N. E. 197.

Sec. 266. Decree.

- (a) *A decree for defendant affirmed notwithstanding inconsistent defense.*

A decree in equity for the defendant will not be reversed because an inconsistent defense, not proved, was set up with that on which the decree is based. *Scanlan v. Scanlan*, 134 Ill. 630.

- (b) *Decree not affected by non-joinder of parties defendant.*

A decree in equity will not be set aside upon error for non-joinder of parties defendant; non-joinder could not have affected the rights of the parties before the court. *Talbot v. Dennis*, 1 Ind. 471, *Smith* 357. So of adding new party, if appellant not injured, *Sinex v. R. Co.*, 27 Ind. 365.

- (c) *Where satisfaction of note and mortgage decreed to plaintiff, overruling demurrer to answer and cross-complaint immaterial.*

In a suit by the maker of a note secured by mortgage to have the instrument decreed satisfied, on the ground that the

debt had been partially paid and the balance tendered, defendant filed a cross-complaint seeking to foreclose, and plaintiff pleaded payment, averring the same facts stated in the complaint. The court found for plaintiff and decreed satisfaction of the note and mortgage. Held that, on appeal, alleged error in overruling a demurrer to the answer to the cross-complaint would not be considered. *Bowen v. Garhold*, 32 Ind. App. 614, 70 N. E. 546, 102 Am. St. Rep. 257.

(d) *Petition containing demands which were ignored by decree.*

Defendants are not hurt by demands in the petition impossible of performance, where they are not required by the decree, of which alone they can complain. *Otto v. Young*, 227 Mo. 193, 127 S. W. 9.

(e) *Not prejudicial to admit decree in evidence and exclude the pleadings in the case.*

Where the rendition of a decree, under which both plaintiff and defendant claimed title, as alleged in the complaint and admitted in the answer, the admission of such decree in evidence is not prejudicial error, and such decree having been admitted and the validity thereof not being attacked, error, if any, in the exclusion of the pleadings in the case in which the decree was rendered is without prejudice to defendant, where there was no averment in the answer which such pleadings would have tended to prove, and it does not appear for what purpose they were offered in evidence or how they became material. *Stafford v. Hornbuckle*, 3 Mont. 488.

(f) *Admission of inadmissible evidence does not invalidate a decree in chancery.*

The error of the court in not rejecting from the report of the judge in chancery, a finding based on inadmissible testimony, does not invalidate its decree, for this could not be

affected by the admission of such evidence. *Butler v. Elliott*, 15 Conn. 205; *Talbott v. Woodford*, 48 W. Va. 449; *Cheney v. Beatty*, 69 Ill. App. 402.

(g) *Where decree expressly states that it was made on bill and answer alone, the wrongful admission of deposition was immaterial.*

Where a decree expressly states that it was made on bill and answer alone, without regard to the deposition which was taken in the case, the wrongful admission of such deposition as evidence is not ground of reversal. *Wilson v. Hoss*, 131 U. S. ccx (D. C.), 24 L. ed. 270.

(h) *Decree unaffected by the admission of improper evidence.*

The decree will not be reversed merely because the chancellor heard incompetent evidence, as he is presumed not to have considered it, and it will be deemed harmless. *Alexander v. Parker*, 42 Ill. App. 455.

(i) *Decree for forfeiture sustained as being merely compensatory damages.*

A decree upon a bill, virtually for the enforcement of a forfeiture, may be sustained on appeal, though equity does not enforce forfeitures, and where actual damages to an amount greater than that of the decree are shown, the decree may be regarded as being compensatory damages merely. *Bucklin v. Masterlik*, 51 Ill. App. 132. And sustained although appellate court might have arrived at another conclusion. *Ashmere v. Hawkins*, 145 Ill. 447.

(j) *Conflicting evidence insufficient to disturb decree.*

Where a final decree has been rendered in a case, the correctness of which is questioned by an assignment of error, on the ground that it is not supported by the evidence, an appellate court will refuse to disturb it, simply because the

evidence is conflicting. *Kelly Co. v. Pollock*, 57 Fla. 459; *Patterson v. Scott*, 37 Ill. App. 520, affm'd, 142 Ill. 138; *Halloran v. Halloran*, 137 Ill. 100.

(k) *In action questioning validity of plaintiff's marriage, admission of decree of divorce of her husband from former wife.*

In an action in which the validity of plaintiff's marriage was attacked, defendant was not injured by the admission of a copy of the decree of divorce dissolving the marriage between the plaintiff's husband and his former wife, as the presumption in favor of the legality of plaintiff's marriage made it unnecessary for plaintiff to prove the divorce. *Erwin v. English*, 61 Conn. 502, 23 A. 753.

(l) *Contract of sale provided that seller should not be liable for delay in delivery caused by strike. Plaintiff's bill did not so allege and evidence showed delay not caused thereby; decree sustained.*

A contract of sale provided that the seller should not be held responsible for any delay in delivery caused by strikes. In an action for failure to deliver the goods plaintiff's bill did not allege that such failure was not on account of a strike, but defendant, without demurring to the bill, answered that the failure was due to a strike. The testimony showed that the failure was not so due, and a decree was rendered for plaintiff. Held, that the bill was probably demurrable for want of an allegation that the failure to deliver was not on account of a strike, the decree should not be reversed on that ground. *American Steel Hoop Co. v. Searles Bros.* (Miss. Sup.), 46 S. 411.

(m) *Decree unaffected for defendant having fund being sued as administrator instead of guardian.*

A decree will not be reversed because a party defendant who has in his hands the fund sought to be condemned, is

sued as administrator instead of guardian, when it appears that the estate has been settled, that all the parties interested in the fund are before the court, and that no injury has been done to anyone. *Chapman v. Hamilton*, 19 Ala. 121.

(n) *Omitted proper parties insufficient reason to set aside a decree.*

Defendant having property settled on her by her former husband purchased land, and borrowed from plaintiff money to pay for it, but plaintiff in a bill against her and her then husband sought to subject the land to the payment of his debt. Defendants answered, and an account was ordered and taken fixing the amount of plaintiff's debt. After the death of defendant, and eight years after the suit was brought, the children of her husband filed an application in the cause setting out their claims under the deed and asked to be made parties in the cause. Plaintiff's administrator answered the petition and the court decreed against them. Held, that though they should have been made parties, as their case was fully stated and investigated on their petition and the answer of the plaintiff's administrator, and after the delay, they would not be allowed to disturb the report of the commissioners, the appellate court will not reverse the decree. *Triplett v. Romine's Adm'r*, 33 Grattan (Va.) 651.

(o) *Decree in equity unaffected by erroneous rulings.*

A decree in equity will not be reversed for erroneous rulings in the admission of evidence, where it can not be seen upon inspection of the entire record that different rulings would have led to a different result. *Burt v. Burt*, 40 Ill. App. 536.

(p) *Premature reference to an auditor will not reverse, when the final decree is substantially correct.*

Before a chancery case is referred to an auditor the principles should be settled and appropriate instructions should

accompany the reference. But, for a premature reference, or for an irregularity in an intermediate proceeding in the case, there should be no reversal when the final decree is substantially correct. *Steele v. Taylor*, 34 Ky (4 Dana) 445.

(q) *Decree will not be set aside when party appealing has no interest in the mortgaged land.*

Under the Code of Civil Procedure, sec. 475, providing inter alia, that no judgment shall be reversed unless by reason of the error complained of the party appealing has suffered injury, error committed in a suit to foreclose is not ground for reversal, where the party appealing has no interest in the mortgaged land. *Foster v. Bowles*, 138 Cal. 446, 71 P. 495.

(r) *Erroneous decree for the sale of land which was not prejudicial.*

Decree declaring a lien on several parcels of defendant's land is not prejudicial to him, even if erroneous in permitting him to discharge them or prevent sale by paying, or provide for the money to be paid to a bank, instead of to plaintiff for the bank's use, or if specially designating only one of the parcels to be sold. *Kreling v. Kreling*, 118 Cal. 413, 50 P. 546.

(s) *Ordinarily a decree allotting dower will not be disturbed.*

Where a bill is filed by the purchaser from the heirs of the real estate of a decedent, attacking an allotment to the widow of dower in said real estate, on the ground that the statutory notice of the application for allotment was not given, and that the allotment was so defectively made as to be void, and when testimony has been taken on these issues and a finding made, in which the real meaning of the report of the commissioners is determined, and a decree entered against the contention of the complainant, and when this

court can not discover that the circuit judge erred in his consideration of the report of the commissioners and the other evidence, his decree will not be disturbed. *Briles v. Bradford*, 54 Fla. 501.

(t) *Decree by consent.*

Error does not lie to review a decree entered by consent. *Armstrong v. Cooper*, 11 Ill. 540; *Frank v. Bernsk*, 4 Ill. App. 627.

(u) *When a party has been charged with too small a sum he is not harmed by the decree.*

A party can not be heard to complain of a decree which charges him with a sum with which he should not be charged, where he is charged on the whole with too small a sum. *Dillsworth v. Curts*, 139 Ill. 508.

(v) *Decree finding title to real estate will not be disturbed.*

The court will not, upon an appeal in equity, reverse a decree which rests upon a finding of fact and would divest the title to real estate, where the testimony is conflicting and unsatisfactory, although not fully convinced of the correctness of the decree. *Rogerson v. Fanning*, 163 Ill. 210.

(w) *Harmless mistake in decree, in serial numbers of certificates of stock ordered to be sold.*

Where a mistake has been made in a decree in the numbers of certain certificates of stock ordered to be sold; held, that the error was without prejudice, and no ground for reversal. *Ft. Madison Lumber Co. v. Bank*, 77 Iowa 393.

(x) *Decree directing delivery of stock to plaintiff will not be disturbed.*

A decree directing the delivery of corporate stock to plaintiff will not be disturbed because the action was brought while the stock was held in pool by a third person, where

the period of the pool has expired. *Turley v. Thomas*, 31 Nev. 181, 101 P. 568.

(y) *Irregularity in proceedings inadequate to affect decree.*

A decree of an orphan's court should not be reversed simply on the ground of irregularity in the proceedings resulting in the decree, in a case where it is entirely clear that the appellant has suffered no injustice or loss by reason of such irregularity. *Davison v. Rake*, 44 N. J. Eq. 506, 16 A. 227, 45 N. J. Eq. 707, 18 A. 752.

(z) *Erroneous reasons immaterial if decree is correct.*

On appeal from a decree dismissing a trustee, it was assigned for error that the reasons stated by the court for making the decree were erroneous. It appeared that the decree was correct. Decree affirmed. *Piper's Appeal*, 20 Pa. 67; *McCracken v. Clarke*, 31 Pa. 498; *Hughes v. Marquette*, 85 Tenn. 127, 2 S. W. 20; *Terrell v. Murray*, 2 Yerg. (Tenn.) 384.

(a-1) *Failure to render a decree by default a mere irregularity.*

Failure to render a decree against defendants who have made no defense, or to take notice of them in the decree rendered against a co-defendant on an issue joined, is a mere irregularity for which a reversal can not be granted. *Singer Mfg. Co. v. Jenkins* (Chy. App. Tenn.), 59 S. W. 660.

(b-1) *Decree sustained for reasons other than given by court below.*

Though the court on appeal does not concur in the reasons assigned by the circuit court rendering the decree complained of, it will permit the decree, where it appears to be a proper one, for other reasons. *Boyd v. Cleghorn*, 94 Va. 780, 27 S. E. 574.

- (c-1) *Harmless error in not stating in the decree that claimant was entitled only to the relief of a general creditor.*

Where the record does not show that there were debts of any kind due from the estate, except the one in controversy, any error in the decree in not stating that the claimant was entitled only to the relief of a general creditor is harmless. *Rohrbaugh v. Bennett*, 30 W. Va. 186, 3 S. E. 593; *Fisher v. McNulty*, Id.

- (d-1) *Decree upon insufficient allegations not prejudicial to defendant.*

That the decree of sale was made on a bill to set aside a lunatic's conveyance filed by the lunatic and his committee, and taken pro tanto, is not ground of objection by defendant, even if the decree was made upon insufficient allegations, as he is not injured thereby. *Wempler v. Wolfinger*, 13 Md. 337.

- (e-1) *Decree erroneously directing that purchaser of equity of redemption, instead of the mortgagor, pay the mortgage debt.*

A decree erroneously directing that the purchaser of the equity of redemption, instead of the mortgagor, pay the mortgage debt, can not, if otherwise regular, be impeached by the bill of review, if it appear that the premises have been sold in satisfaction of the debt, and the decree satisfied. *Dun v. Rodgers*, 43 Ill. 260.

- (f-1) *Entering decree dismissing appeal, instead of affirming the order of the commissioner, no rights being prejudiced.*

Where, on appeal from an order of the United States Commissioner in Alaska, as ex officio probate judge approving the final account of a guardian and discharging him, the district court made findings, upon which it should have entered a decree affirming the order of the commissioner, the

rights of the parties are not prejudiced because instead, it entered a decree dismissing the appeal. *Corcoran v. Kestrometinoff* (Alaska), 164 F. 685.

Sec. 267. Equity.

(a) *Lettering, instead of numbering, a bill in equity.*

While there is no necessity of lettering the sections of the bill instead of numbering them, as required by rule of practice No. 8, lettering instead of numbering them is not reversible error, where the purpose of the rule was effected by the lettering. *Grubbs v. Hawes* (Ala. Sup.), 56 S. 227.

(b) *In an equity proceeding assignments of error based on alleged illegal evidence, will not be considered where unobjectionable evidence is sufficient.*

In an equity proceeding assignments of error based on the alleged admission of illegal evidence, will not be considered where there is sufficient unobjectionable evidence to sustain it. *Kilham v. Western Bank & Safe Deposit Co.*, 30 Col. 365, 70 P. 409; *Rowe v. Johnson*, 33 Col. 469, 81 P. 268; *Merson v. Merson*, 101 Mich. 55, 59 N. W. 441; *Hun v. Bouton*, 57 App. Div. 351, 102 St. Rep. 112, 68 N. Y. Supp. 112.

(c) *Equity case will not be reversed for erroneous exclusion of evidence offered by plaintiff applicable only to insufficient defense.*

In an equity case, of two different defenses which the answer sought to set up, one was so badly pleaded as not to sustain the finding or judgment for defendant. The other was sufficiently set up and sustained by the evidence. There was a general finding for defendant. Held, that the appellate court would not reverse for the erroneous exclusion of testimony offered by plaintiff upon and applicable only to the defense insufficiently set up. *Bank v. Harrison*, 16 Neb. 635, 21 N. W. 446.

- (d) *In chancery cases minor defects overlooked if decree be right.*

In chancery cases appellate courts will not notice minor errors if, on the whole record, the decree be right. *Goode v. Smith*, 13 Cal. 81.

- (f) *Action placed on the law, instead of equity calendar, jury being waived.*

Where a jury was waived in the action tried by the court, it was immaterial that it was on the law instead of the equity calendar. *Ill. Surety Co. v. U. S. (S. C.)*, 215 F. 334, writ of error to Sup. Ct. granted, *Id.* 1007.

- (g) *Where appellate court possesses case as in equity, judgment for right party affirmed regardless of rulings of trial court.*

In reviewing on appeal a motion against a stockholder for execution, the appellate court, where all the evidence is before it, is possessed of the case as a case in equity, and must affirm the judgment, if it is for the right party, irrespective of the rulings of the trial court. *Coquard v. Prendergast*, 35 Mo. App. 237; *Ollesheimer v. Thompson Mfg. Co.*, 44 Mo. App. 172.

- (h) *An equity case will not be reversed because record discloses no judgment sustaining or overruling a demurrer.*

The supreme court will not reverse in an equity case because the record discloses no judgment either sustaining or overruling a demurrer. *Winfried v. Yates, Dallam (Texas)* 364.

- (i) *Error in overruling objection to proposed issue to jury in equity case insufficient to warrant a reversal.*

Reversal is not warranted by error in overruling an objection to a proposed issue submitted to the jury in equity case,

if, notwithstanding the answers of the jury, the court find all the facts connected with such issue. *Graham v. Stewart*, 68 Cal. 374, 9 P. 555.

(j) *Chancery case tried as an action at law worked no injury.*

An action for the breach of a sheriff's county levy bond, having been properly brought in a court having only a law jurisdiction, the refusal of the court to subsequently transfer the action to equity, so that a chancellor, with the aid of his conscience, might correct certain alleged mistakes made by the sheriff in his various settlements, was not prejudicial to defendants, it appearing that every question and transaction was as carefully considered and reported by a conscientious judge, and passed upon as if the action had been tried and decided by the chancellor. *Mullins v. Pendleton County Court*, 6 Ky. L. R. (abst.) 598; *Darnall v. Jones's Ex'rs*, 24 Ky. L. R. 2090, 72 S. W. 1108.

(k) *Refusal in equity case to submit facts to jury harmless, since their verdict is merely advisory.*

Where, in an equity case, the court erroneously refuses to exercise its discretion and submit the facts to a jury, on the ground of want of authority of party demanding a jury, is not entitled to a reversal, since the verdict of a jury is only advisory, and the case is retried in the supreme court on the facts. *Dearborn Foundry Co. v. Augustine*, 5 Wash. 57, 31 P. 327.

(l) *On a bill for specific performance, failure to make creditors of purchaser parties not available objection on appeal.*

Where the decree in a vendor's bill for specific performance and for the determination of conflicting interests set up by the purchaser and his wife and one to whom the purchaser had assigned in trust for creditors directed a convey-

ance in accordance with the claim set up in the answer of the purchaser, an objection based on the failure to make the creditors of the purchaser parties was not available on appeal by the purchaser. *Hanchett v. McQueen*, 32 Mich. 22.

Sec. 268. Injunction.

- (a) *Admitting evidence that defendant had been injured in his business by the suit and injunction issued.*

Where, in an action based on the claim that a contract had been mutually abandoned, the verdict was that the contract had not been abandoned, the admission of evidence that defendant had been injured in his business by the institution of the suit and the services of the injunction therein was not reversible error. *Darst v. Devini* (Tex. Civ. App.), 102 S. W. 787.

- (b) *Refusal of the court to require an injunction bond.*

Refusal to require an injunction bond is harmless, where the final decree made the injunction perpetual. *Wagner v. Shank*, 59 Md. 313.

- (c) *Issuing prohibition against justice's court to restrain enforcement of a void judgment.*

The error in issuing prohibition against a justice of the peace to restrain the enforcement by execution, or otherwise, of a void judgment rendered by it, is not prejudicial, where no costs are taxed or judgment rendered against the court except to restrain the enforcement of the judgment. *Campbell v. Durand* (Utah Sup.), 115 P. 986.

- (d) *Injunction dissolved against non-residents for want of jurisdiction.*

No exception lies to the action of the court below in dissolving an injunction as against non-residents named as defendants, over whom jurisdiction had not been acquired. *Geneva v. Carpenter*, 24 Wis. 276.

- (e) *Injunction suit for possession of realty, where ejection was proper remedy.*

When a controversy over a question of the title and right to possession of realty has been tried in an injunction suit, in which a jury trial was had, and each party had a full opportunity to present its contentions, though ejection would have been a more appropriate remedy, the judgment will not be reversed. *J. R. Crowe Coal & Min. Co. v. Atkinson*, 85 Kan. 357, 116 P. 499.

- (f) *Erroneous refusal to grant a preliminary injunction insufficient to cause a remand therefor.*

Though a rule against the granting of a preliminary injunction is unauthorized, where such rule was established, and on its trial discharged, and the case was subsequently tried and judgment had for defendant, and it appears on appeal that the judgment was proper on the merits, the supreme court will not remand the case and grant a preliminary injunction. *Sinnot v. A. Rocherwau Co.*, 34 La. Ann. 784.

- (g) *Act of court in refusing injunction will not be reviewed on appeal, when act sought to be enjoined was done.*

Though, at the time the bill was filed the remedy asked appeared sound, the action of the court below in refusing to grant the injunction will not be reviewed, where it appears that, at the time of the appeal, the act sought to be enjoined was done. *Smith v. Davis*, 22 Fla. 405.

- (h) *Erroneous refusal of injunction remedied by legislative act.*

The court of appeals will not reverse a decree refusing an injunction, though erroneous, when, pending the appeal, the right on which complainant's claim is founded is taken away from him by legislative act. *Muskogee Nat. Tel. Co. v. Hall*, 4 Ind. Ter. 18, 64 S. W. 600.

- (i) *Irregularity in preliminary proceedings for injunction harmless, injunction being made perpetual.*

Where a petition for an injunction is regularly filed with the circuit clerk, and the circuit court takes cognizance of the cause and tries the same, rendering final judgment therein, the irregularity of the proceeding before the probate court in obtaining a temporary injunction is immaterial. *McPike v. West*, 71 Mo. 199.

- (j) *Judgment dissolving injunction on conflicting affidavits.*

That a temporary injunction is dissolved on affidavits which are conflicting, and no finding of facts is made, the reviewing court will not reverse merely on the weight of the evidence. *Ferry v. Gottlieb*, 45 O. S. 195.

- (k) *Propriety of granting injunction not inquired into if judgment be correct.*

When, in ejectment, an interlocutory injunction restraining waste was granted to plaintiff, and subsequently, also the judgment was in his favor, the appellate court will not consider the propriety of the injunction, if the judgment was correct. *Hicks v. Davis*, 4 Cal. 67.

- (l) *Erroneous modification of injunction unavailable as error.*

Even though there be error in modifying an injunction before complainant has opportunity to present his proof, yet if such modification be properly continued in force, without full opportunity for proof, the error can not avail on appeal. *Haile v. Venable*, 53 Fla. 788.

- (m) *Restraining order covering too much property is harmless.*

A restraining order will not be reversed because it embraces naval stores not covered by the mortgage, the subject matter of the suit, but in fact embraced in a similar

suit before the same chancellor, then pending in another county between the same parties. *Graham v. Consolidated Naval Stores Co.*, 57 Fla. 418.

(n) *Erroneously enjoining trustee in restraining order was harmless.*

Where the beneficiary in a deed of trust securing a debt is properly enjoined from enforcing the trust, the fact that the trustee, where he has power to sell at the instance of the beneficiary only, is included in the restraining order, if error, is harmless. *Nave v. Adams*, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421.

(o) *Error in overruling motion to dissolve temporary injunction cured by final judgment making same perpetual.*

An error of the court in overruling a motion to dissolve a temporary injunction to stay proceedings on a judgment did not prejudice the defendant, when, in the final judgment on the whole case, he was permanently enjoined from the same proceeding. *Mitchell v. Magowan*, 13 Ky. L. R. (abst.) 685. Perpetual injunction proper, error in granting preliminary irredressible, *Bd. of Com. of Clay Co. v. Markle*, 46 Ind. 96; *Henry v. Block*, 90 Ind. 534.

(p) *Refusal to charge, the attorney's fees, loss of time, and expenses incurred in attending court hearings, were not elements of damage on an injunction bond.*

In assessing damages on an injunction bond, the refusal of the court to instruct that "attorney's fees, loss of time, and expenses incurred in attending the hearings of and respecting the application in the probate court for a temporary injunction, will not be considered as elements of damages," is not prejudicial error, where another instruction given declared that only such attorney's fees "as pertained to the dissolution of the temporary injunction could be allowed,"

and in the examination of witnesses touching the value of the service of defendant's attorney, inquiry was limited to work done in securing the dissolution of the injunction. *Helmkampf v. Wood*, 84 Mo. App. 261.

(q) *Judgment dissolving injunction and dismissing petition will not be reversed on conflicting testimony.*

Dissolving an injunction and dismissing the petition at plaintiff's costs, on a conflict of testimony, will not be reversed unless judgment was against the weight of the evidence. *Crawfis v. McClure*, 30 O. S. 216.

(r) *In action on injunction bond, error in instruction not available to obligors.*

In an action on the injunction bond, after the dissolution of an injunction restraining the foreclosure of a deed of trust, the court instructed that, in assessing damages, the jury must "not consider the actual or any rent that was or might have been collected from the occupants of said premises during the continuance of the injunction;" held, that if this instruction was error, it was error of which the obligors on the bond could not complain. *Holthaus v. Hart*, 9 Mo. App. 1.

Sec. 269. Liens.

(a) *Error in striking from answer cured by lien of defendant.*

In ejectment, any error in striking parts of an answer relating to the payment of taxes by the defendant, under a belief that the plaintiff did not claim any interest in the land, was harmless, when a judgment for plaintiff, afterwards entered gave the defendant a lien upon the land for the amount of such taxes. *Dameron v. Jamison*, 143 Mo. 483, 45 S. W. 258.

(b) *Admission of record of mechanic's lien, made in the wrong book, was harmless error.*

Though Elliott's Supp., sec. 1691, requires the recorder to record the notice of mechanic's lien in the miscellaneous record, such lien was entered in what was called the "mechanic's lien record." Held, that it was erroneous to admit in evidence this entry, as no mechanic's lien record was authorized by law, since the lien was acquired by filing the notice and not by its record. *Adams v. Shaffer*, 132 Ind. 331, 31 N. E. 1108.

(c) *Erroneous instruction as to lien for rent not prejudicial.*

In an action by a mortgagee on a chattel mortgage against a constable and certain creditors of the mortgagor for damages for levying upon and selling, under attachment, the mortgaged property, an instruction to the effect that the landlord of the mortgagor had a lien on the crop for rent due and unpaid, could not have prejudiced plaintiff, where it may be gathered from the testimony that the mortgagor rented and did not own his own farm. *Cordes v. Straszer*, 8 Mo. App. 61; *Holland v. McCarty*, 24 Mo. App. 82.

(d) *Error in instruction, based on lien, where none existed.*

Where a party claiming a landlord's lien complained of error in instructions with reference to the property to which such lien attached; held, that the error, if any, was without prejudice, in view of the fact that there was no evidence of the existence of any lien. *Wilson v. Trowbridge*, 71 Iowa 345.

(e) *In action to enforce mechanic's lien, statement by owner that he paid the contractor was not prejudicial error.*

In an action to enforce a mechanic's lien by one who furnished material to the contractor who erected a house for W., the statement of W., on the witness stand, that he paid

the contractor for the building was not prejudicial to plaintiff. *Thayer v. Williams*, 65 Mo. App. 673.

Sec. 270. Mistakes.

(b) *In an action for the price of coal, upon which plaintiff was not entitled to recover, any mistakes in admitting or rejecting evidence or in instructions were immaterial.*

It appearing, in an action for the price of coal which defendant buyer refused to receive, and which was sold by the carrier for freight and demurrage charges, that plaintiff seller was not entitled to recover because it did not furnish the grade contracted for, any mistakes of the trial court in admitting or rejecting evidence, or in instructions, are not reversible error. *Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 41 Ind. App. 658, 84 N. E. 776.

(c) *By mistake in instruction jury permitted to treat the declaration as evidence.*

An instruction did not require a reversal where, by an evident mistake the jury were permitted to consider the declaration as evidence, it not appearing that the declaration was taken by the jury. *Naw v. Standard Oil Co.*, 154 Ill. App. 421.

(d) *Court inadvertently permitting evidence that physician's services to plaintiff were reasonably worth \$150, not reversible error.*

In an action for injuries, a physician had previously testified that his attendance on plaintiff had cost plaintiff nothing, and the court's charge on damages excluded allowance for such item, the fact that the court inadvertently permitted the witness's evidence that his services were reasonably worth \$150 to stand, over objections, on the promise of plaintiff's counsel to show its relevancy, which he failed to do, did not

constitute reversible error. *R. Co. v. Davis* (Tex. Civ. App.), 83 S. W. 718.

(e) *Mistake in improperly allowing interest insufficiently important for reversal of judgment.*

Mistake in allowance of interest insufficiently substantial to call for reversal of judgment. *Mercer v. Vose*, 67 N. Y. 56, 59.

(f) *In action for injuries from being mistakenly shot, instruction placing too high a degree of care upon defendant.*

Where, in an action for injuries to plaintiff, by being shot by defendant's mistaking him for a deer, defendant, under the evidence was negligent as a matter of law, and was not prejudiced by an instruction requiring him to exercise too high a degree of care. *Harper v. Holcomb* (Wis. Sup.), 130 N. W. 1128.

(g) *Action, by mistake, brought as negligence, when should have been assault, will not disturb the judgment for plaintiff.*

Though the views of the trial court, concurred in by defendant's counsel, in an action against the master for injury to a trespasser by the servant of the master using greater force than necessary to put him off the master's sleigh, that the action was one for negligence was erroneous, the judgment for plaintiff will not be disturbed, the facts warranting the finding by the jury casting liability on the master, there being no ruling that harmed him. *Dealy v. Coble*, 98 N. Y. Supp. 452, 112 App. Div. 296.

(h) *That action was mistakenly brought by husband and wife for injuries to latter was error without prejudice.*

Where a suit to recover for injuries to the wife was erroneously prosecuted by the husband and wife jointly, but

no objection was made thereto at the trial, and no prejudice resulted to the defendants therefrom, a judgment for plaintiffs will not be reversed for such misjoinder. *R. Co. v. Baumgarten*, 31 Tex. Civ. App. 253, 72 S. W. 78; *Western U. Tel. Co. v. Campbell*, 36 Tex. Civ. App. 276, 81 S. W. 580.

Sec. 271. Mortgages.

(a) *In a suit to foreclose a mortgage, failure of petition seeking an injunction to aver impairment of security.*

In a suit to foreclose a mortgage, an allegation in the petition that the defendant is about to remove fixtures from the premises, and that such removal "will work injury to such real property, and that said injury will be irreparable, and that no adequate remedy at law exists whereby the plaintiff may protect himself against said detaching, wasting, damaging and removing of said parts of said real estate, and against the consequent damages and loss to said real property and plaintiff's security," and praying for an injunction, though objectionable in not directly stating that the security would be so impaired as to be rendered insufficient, is not ground for reversal of an order denying a motion to dissolve the injunction, where the hearing on the application for the injunction was before answer, and was upon affidavits filed by the contending parties, and the defect in the petition could be remedied by amendment. *Anderson v. Englehart* (Wyo. Sup.), 108 P. 977.

(b) *In suit on notes and to foreclose mortgage security, harmless error in attacking cancellation of notes and mortgage on defendant's cross-complaint.*

In a suit on notes and to foreclose the mortgage security, any error in decreeing a cancellation of the notes and mortgage on defendant's cross-complaint was harmless, where the judgment that plaintiff take nothing by his action could not

be successfully attacked. *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619.

(c) *Error in pleading payment to action continued by administrator to foreclose a mortgage.*

After the death of plaintiff in a suit to foreclose his administrator continued the suit, and defendant pleaded payment "to the complaint before the commencement of the suit;" held, upon demurrer, that though error it was harmless. *Huston v. Vail*, 84 Ind. 262.

(d) *Overruling demurrer to answer when judgment given on note and mortgage.*

Where a note, secured by mortgage, was executed jointly by husband and wife, and plaintiff was awarded judgment against the husband for the full amount of the note, plaintiff was not harmed by the overruling of its demurrer to the husband's answer for want of facts sufficient to constitute a defense. *Equitable Trust Co. v. Torphy*, 37 Ind. App. 220, 76 N. E. 639.

(e) *Foreclosure on first and second mortgages separately, though covering the same and other property, erroneous, but defendant not injured.*

A mortgagor gave a second mortgage to secure the same debt, covering the property described by the first mortgage and other property, and by mistake foreclosure was had under the first mortgage alone, and subsequently defendant caused the property covered by the second mortgage alone to be sold under execution against the mortgagor, and purchased the same at an execution sale. In an action to cancel the foreclosure of the first mortgage and foreclose the second mortgage, the second mortgage was foreclosed, after the cancellation of the first mortgage foreclosure. Held, that while it was error for the court to foreclose the second mortgage, without vacating the first decree, there being there-

by two different decrees in two actions, for the collection of the same debt, in violation of the Code of Civil Procedure, sec. 726, declaring that there can be but one action for the recovery of any debt, it was not ground for a reversal defendant not being injured thereby. *Gerig v. Loveland*, 130 Cal. 512, 62 P. 830.

(f) *Where defendant, in a foreclosure suit, has no interest in the amount of plaintiff's recovery, he can not complain of improper evidence bearing on the amount of recovery.*

Where a defendant in a foreclosure suit has no right in the premises and no personal liability, and no interest in the amount of plaintiff's recovery, he can not complain, on appeal, of error in the admission of evidence bearing on the amount of recovery. *Dayton v. McAllister*, 129 Cal. 192, 61 P. 913.

(g) *Erroneous admission of mortgages on property levied on.*

Where the claimant of property levied on under execution claimed under a bill of sale from the execution defendant, his son, which was alleged to be in fraud of the son's creditors, the admission of mortgages executed by the execution defendant to other persons, though irrelevant and immaterial, was not prejudicial to plaintiff. *Finnell v. Million*, 99 Mo. App. 552, 74 S. W. 419.

(h) *Admitting evidence that defendant declined to permit plaintiff to make sales for sums sufficient to pay mortgage debt.*

Where, in an action for usury paid on a loan secured by a real estate mortgage, there was evidence that defendant took advantage of the plaintiff's condition by knowingly taking usurious interest, the admission of evidence that defendant declined to permit plaintiff to make sales for sums sufficient to pay the mortgage debt, by his refusing to release the lien

of the mortgage to the purchaser, was not reversible error. *Cuthbertson v. Austin*, 152 N. C. 336, 67 S. E. 749.

(i) *Where availability of evidence depended on whether mortgagor was insolvent or contemplated insolvency was negatived by verdict of jury, its exclusion was harmless.*

A debt was secured by both real and chattel mortgages, and subsequently the chattels were attached at the suit of other creditors. The real estate was sold and the proceeds applied to the debt, but failed to satisfy it, and the mortgagees brought action against the marshal and his bondsmen to recover the value of the attached chattels. Held, that the fact that when the instrument was offered in evidence, the court stated its availability depended entirely on whether the mortgagor was insolvent or contemplated insolvency when he made it can not avail defendants, whether the opinion was correct or not, because the verdict for plaintiff negatived the existence of the facts suggested. *Ragan v. Aiken* (Texas), 138 U. S. 109, 34 L. ed. 892.

(j) *Excluding evidence of mortgage given to surety, when execution of mortgage and other facts already proved by parol testimony.*

In a suit against several defendants on a note which one of them signed as surety, and the others as principal debtors, where the only defense is that plaintiff failed to collect the note as he agreed to do, it is not error to exclude from evidence a mortgage given by the principal debtors to the surety two months after the execution of the note, when the execution of the mortgage, and its terms and conditions, have been already proved by parol testimony. *Glover v. Stevenson*, 126 Ind. 332, 26 N. E. 486.

(k) *Exclusion of mortgage, where the facts appeared by oral testimony.*

Where facts relating to a mortgage were made to appear

by oral testimony, the exclusion of a mortgage was, if error, harmless. *Hill Bros. v. Bank*, 100 Mo. App. 230, 73 S. W. 307.

(l) *Admitting in evidence chattel mortgage not registered as required by law.*

Any error in admitting in evidence a chattel mortgage not registered as required by law, was not error, in the absence of a showing of prejudice, where the mortgage merely renewed and did not cancel a mortgage which was properly registered. *Steiner v. Anderson* (Tex. Civ. App.), 130 S. W. 261.

(m) *Part owner of mortgaged property can not complain of foreclosure.*

Appellant owning part of mortgaged property can not complain because the whole property was sold on foreclosure by her mortgagee. *Loring v. Stuart*, 79 Cal. 203, 21 P. 651.

(n) *Defendant in foreclosure proceeding can not complain where, owing to error in the name, the decree freed her from liability.*

In a mortgage foreclosure a Mrs. M. Q. was made a defendant and an injunction prayed and summons was served on her, and the decree enjoined Mrs. A. M. Q., who appealed. Held, that such appellant could not complain of an amendment by the trial court pending appeal whereby the initial "A" was stricken from the records, as the correction freed her from all liability under the decree. *Fay v. Steubenbauch*, 141 Cal. 573, 75 P. 174.

(o) *Harmless error to fail to provide for redemption in a judgment of foreclosure.*

The omission to provide for redemption in a judgment of foreclosure is harmless error. *Swenney v. Hill*, 69 Kan. 868, 77 P. 696.

- (p) *Error in holding provision requiring mortgage to be paid in gold valid is harmless, where decree does not require payment in any particular money.*

Error, if any, in holding a provision requiring a mortgage to be paid in gold valid, is harmless, where the decree of foreclosure does not require payment in any particular money, since, conceding the invalidity of the gold clause, the liability to pay in legal tender remains. Decree 76 Ill. App. 548, affirmed, *Roe v. Homstead Loan & Guaranty Co.*, 178 Ill. 369, 53 N. E. 220.

- (q) *Court direction, "Let judgment be entered accordingly," if insufficient as a conclusion of law, the substantial rights of parties being unaffected, would not require reversal of decree of foreclosure.*

Where the court found as a fact on foreclosure, that plaintiff's mortgage was superior to the liens claimed by defendant, a direction, "Let judgment be entered accordingly," if insufficient as a conclusion of law, would not require a reversal of the decree of foreclosure, the substantial rights of the parties being unaffected by the defect. *Rea v. Haffenden*, 116 Cal. 596, 48 P. 716.

- (r) *In action for converting mortgaged property, instruction for defendant, "if its agent exceeded his authority in selling the property and defendant did not ratify his acts," etc.*

In an action for converting mortgaged property, an instruction for defendant, if its agent exceeded his authority in selling the property, and defendant did not ratify his acts, was not prejudicial error, though defendant would have been entitled to a more favorable instruction. *Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co.* (Tex. Civ. App.), 129 S. W. 1161.

- (c) *Immaterial errors in action finding that horse was not the one mortgaged to plaintiff.*

In an action to recover a horse alleged to have been mortgaged to plaintiff and sold by the mortgagor to defendant, where the jury found that the horse was not the one covered by the mortgage, and no error was assigned to the finding, errors relating to the evidence and instructions as to the purchase of the horse by defendant, without notice, are immaterial and will not be reviewed. *Stewart v. Bowerman*, 129 Mich. 163, 8 D. L. N. 896, 88 N. W. 396.

Sec. 272. Nuisance.

- (a) *In action for damages for nuisance, evidence of value of the property before and after the injury complained of.*

In an action for damages for a temporary private nuisance the admission of evidence as to the value of the property before and after the injury complained of, though erroneous, was not prejudicial, where the court subsequently charged that there could be no recovery for permanent injury, or for diminution in the value of plaintiff's property. *Carroll Springs Distillery Co. v. Schnepfe*, 111 Md. 420, 74 A. 828. So as to the difference in rental value. *Risher v. Acker Coal Co.* (Iowa Sup.), 124 N. W. 764.

- (b) *In action to recover damages for injuries to real estate from a nuisance, charge stating the amount of plaintiff's claim.*

In an action to recover damages for injuries to real estate resulting from a nuisance, a verdict and judgment for plaintiff will not be reversed because the trial judge, in his charge, stated the amount of plaintiff's claim, where it appears that there was no intimation from the court that this was the amount to which the plaintiff was entitled, and it appears

that the jury was particularly instructed to take into consideration all the evidence bearing upon the question as to what would compensate plaintiff for his loss. *Green v. Sun Co.*, 32 Pa. Super Ct. 521.

(c) *In action to enjoin liquor nuisance, plaintiff's withdrawal ignored and action proceeded with by county attorney.*

Where, in an action to enjoin a liquor nuisance, defendant presented a paper, signed by plaintiff, requesting the dismissal of the action; on refusal of the court to dismiss defendant, an order directing that the action proceed under the care of the county attorney without assistance, could not prejudice the state, it appearing that the county attorney was fully conversant with the case and capable of conducting the examination. *State v. Hibner*, 115 Iowa 48, 87 N. W. 741.

(d) *Plaintiff entitled to judgment against defendant for maintaining a nuisance, although pleaded that plaintiff also was guilty.*

In an action against a city for allowing garbage, which emitted nauseous odors, to be dumped in a street adjacent to plaintiff's premises, interfering with her enjoyment thereof, where the evidence disclosed that plaintiff also permitted garbage to accumulate on her lot, an answer by the jury to a special interrogatory, as to whether or not nauseous odors were emitted from the garbage on plaintiff's lot, that they did not know, is not reversible error, where there was a verdict for plaintiff, since plaintiff could recover for defendant's wrongful maintenance of a nuisance, irrespective of whether or not she herself maintained one on her own land. *Correll v. City of Cedar Rapids*, 110 Iowa 333, 81 N. W. 724.

- (e) *Abating nuisance upon ground not mentioned in the complaint was not prejudicial.*

Defendant could not be prejudicial if the court abated a nuisance in question upon a ground not mentioned in the complaint, where the ground upon which it was abated existed, and was a legal ground for abating it. *Lepper v. Wisconsin Sugar Co.* (Wis. Sup.), 128 N. W. 54.

Sec. 273. Partition.

- (a) *In suit for partition erroneous admission of writing in evidence.*

In a suit for partition of realty, a writing made by plaintiff's father was admitted, stating that plaintiff had received a certain amount of land and money, on an issue as to the amount which had been advanced to plaintiff by his father. Held, that the case having been tried to the court, and there being a correct basis for its finding, any alleged error in admitting the writing was non-prejudicial. *Dobbins v. Himphreys*, 171 Mo. 198, 70 S. W. 815.

- (b) *In action for partition, in which a note was presented, instruction that burden was on them who alleged forgery to show it.*

In an action of partition and winding up of decedent's estate, in which a note was presented claimed to have been signed by the intestate, error in instructing that the burden was upon those who claimed it was forged to show it, was not prejudicial to the objectors, where claimant made a prima facie showing that it was signed by intestate, so as to shift the burden to objectors. *Jenkins v. Jenkins*, 83 S. C. 537, 65 S. E. 736.

- (c) *Erroneously holding homestead not subject to partition could not be complained of by the widow.*

A homestead was erroneously held by the trial court not

to be subject to partition. Defendant's judgment was reversed by the court of civil appeals upon other grounds, in both courts the widow claiming the homestead amount she was entitled to under the partition. Held, that the widow could not complain, and the heirs were entitled to have the judgment of the trial court affirmed, however much it might wrong them. *Clemons v. Clemons*, 92 Tex. 66, 45 S. W. 996.

Sec. 274. Quiet title.

- (a) *In action to quiet title, erroneous admission in evidence of the alleged protest of plaintiff against assignees of certificate of purchase to the defendant.*

Where, in a suit to quiet title, plaintiff was entitled to recover if the lands involved were embraced in the description in a patent to him, but otherwise defendant, who claimed under a subsequent certificate of purchase, was entitled to recover; the erroneous admission in evidence of an alleged protest of plaintiff against the issuance of a certificate of purchase to the defendant was harmless. 66 P. 858 reversed on rehearing, *Miller v. Grunsky*, 141 Cal. 441, 75 P. 48.

- (b) *In action to quiet title, erroneous admission of evidence to show location of boundary line in dispute.*

Where the decision in a case to quiet title may be based entirely on adverse possession, the erroneous admission of evidence tending to show the location of the boundary of the premises in dispute is harmless. *Powers v. Bank*, 136 Cal. 486, 69 P. 151.

- (c) *In action to quiet title, instruction that plaintiff's prior legal title should be sustained.*

Where, in an action to quiet title, tried to the court, without a jury, in so far as the issue of title was concerned, an

instruction that plaintiff's prior legal title should be sustained, though the jury should find that W had a temporary building or structure on the land, which he occupied for a few months and then abandoned, was not prejudicial to defendants. *Stone v. Perkins*, 217 Mo. 586, 117 S. W. 717.

(d) *Plaintiff defeated in a suit to quiet title may not complain because court required defendant to reimburse plaintiff for taxes and interest paid.*

A plaintiff defeated in a suit to quiet title based on a tax-deed adjudged void, may not complain because the court required defendant, adjudged the owner in fee, to pay a sum to reimburse plaintiff for taxes and interest paid by her, on the ground that the pleadings did not justify such relief. *Harrison v. Hodges* (Col. Sup.), 111 P. 706.

(e) *In action to quiet title, substantial rights of the parties unaffected by harmless error.*

Whether or not a cause of action to quiet title is improperly joined with one against a trustee of real estate having no beneficial interest, if the plaintiff is not entitled to a conveyance from the trustee, and the trustee could have recovered from the other defendant in the cause of action to quiet title, the substantial rights of the parties are not affected, and judgment will not be reversed for such error. *Reynolds v. Lincoln*, 71 Cal. 183, 12 P. 449.

(f) *In action to quiet title, admission of the record in ejectment did not injure plaintiff.*

In an action to quiet title, where the defendants showed good title under a tax-deed, the admission in evidence of the record of an action in ejectment in which judgment was rendered for defendants did not injure plaintiff. *Fleming v. Tatum*, 232 Mo. 678, 135 S. W. 61.

CHAPTER XI.

STATUTORY AND MISCELLANEOUS PROCEEDINGS.

- Sec. 275. Administration.
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Sec. 275. Administration.

- (a) *In a suit by executors plea of set-off was filed amenable to statute of limitations and demurrer thereto erroneously sustained.*

In a suit by executors, where a plea of set-off, amenable to the statute of limitations, is filed, the erroneous sustaining of a demurrer to such plea is not reversible error, where it was the duty of the executors to interpose the bar of the statute which would have defeated the set-off. *Pollard v. Donovan*, 82 Ill. App. 22.

- (b) *In action by administrator for death of intestate, exclusion of evidence of size of deceased's farm, etc.*

Where in an action by an administrator for the death of his intestate, after evidence as to the industrious habits of deceased had been admitted, without question, defendants admitted of record that the expectancy of deceased was 21 years, at the time of his death, and that plaintiff's testimony

will show the value of the services of deceased to have been one-thousand dollars per year, the exclusion of evidence as to the size of deceased's farm, and whether he accumulated his property after his marriage, if error, is without prejudice to plaintiff. 58 N. W. 1068 reversed, McKelvey v. R. Co., 94 Iowa 668, 63 N. W. 608.

(c) *Admission of evidence of complainant, in action against an administrator, was harmless.*

Where, in an action by the widow against the administrator of her deceased husband, for moneys which she alleged her husband obtained by forging her signature to a check, complainant testified that the signature in question was not hers. Her father, mother and brother testified to the same effect. Her husband's father and sister testified that they heard complainant say that she intended her husband to have the money. Held that, though complainant was an incompetent witness, the admission of her testimony was harmless, as the other evidence was sufficient to sustain the decree in her favor. Moore v. Decell (Miss. Sup.), 17 S. 681.

(d) *Permitting claimant, in proceedings against decedent's estate, to testify to matters equally within the knowledge of deceased.*

Permitting claimant, in proceedings against a decedent's estate to testify as to matters equally within the knowledge of deceased, is harmless, where the testimony related only to matters not in dispute. Beecham v. Johnson's Est., 160 Mich. 585, 125 N. W. 702, 17 D. L. N. 165.

(e) *In action against an administratrix on note endorsed by decedent, instruction that to transfer holder should place his name on back of note and deliver to purchaser.*

Where, in an action against the widow, as administratrix of her deceased husband, on a note endorsed by him, the

question of the liability of an indorser was not involved, an instruction that to transfer the title to the note, it was necessary that the person holding it shall place his name on the back of it, and deliver it to the purchaser, was not prejudicial to plaintiff, and, if he desired more specific instructions on the question of the purpose of an indorsement, he should have requested it. *O'Connor v. Slatter*. (Wash. Sup.), 93 P. 1078.

(f) *Opening and re-auditing account of administratrix, eight years after confirmation, not ground for reversal.*

An administratrix filed her final account showing distribution of the assets, and the account was confirmed. About eight years thereafter suit was begun on a guardian's bond, on which the intestate had become surety, and judgment was recovered against the administratrix. A petition was filed by the plaintiff in the judgment for an opening and re-audit of the account of the administratrix, with permission to petitioners to prove their claims. The prayer of the petition was granted, and the administratrix appealed from the decree. It was urged that the petition, not having been presented within five years allowed by law for a review of the account, the decree was erroneous. The right of the petitioners to have the administratrix charged with the assets improperly distributed to the amount of their judgment was clear, without the aid of the review. Held, that although the petition was brought too late, yet such order thereon did not affect the result of the proceedings, and so did not prejudice the rights of the parties, it was not ground for reversal. *Louie Jones's Appeals*, 99 Pa. 124, 11 Weekly Notes Cas. 554.

(g) *Administrator can not object to denial of certain credits when, on the other hand, not required to account for a greater amount.*

In an action against administrators for settlement of an

estate, defendants were not entitled to object on appeal that they were erroneously denied credit for certain sums, when it also appeared that they had not been required to account for the proceeds of certain other transactions which would have greatly overbalanced such credits. *Steel's Administrators v. Lewis*, 32 Ky. L. R. 439, 105 S. W. 1191.

Sec. 276. Assignments.

(a) *Instruction that it is the duty of an insolvent debtor to make an assignment.*

In an action to set aside an assignment for the benefit of creditors, an instruction that it is the duty of an insolvent debtor to make such an assignment, is the statement of an abstract proposition and is harmless error. *Sanger v. Flow* (Okl.), 48 F. 152, 1 C. C. A. 56; followed, *Baer v. Rooks*, 50 F. 898, 2 C. C. A. 76.

(b) *Instruction that an assignee in insolvency took the assignor's rights and disabilities.*

An instruction that the assignee in insolvency took the assignor's rights and disabilities was not prejudicial error for ignoring the question of fraud, where there was no evidence of fraud. *Conley v. Murdock* (Me. Sup.), 76 A. 682.

(c) *Instruction that assignment was made to hinder or delay creditors.*

The answer of an interpleader in garnishment proceedings on an execution issued from the circuit court alleging that the assignment from the original debtor to the interpleader was for the purpose of hindering and delaying the plaintiff in the collection of his judgment. Held that, though the instruction that, if the assignment was made to hinder or delay "creditors," etc., was erroneous, as being broader than the pleading, the error was not prejudicial, where the evi-

dence, if it proved fraud at all, proved that plaintiff was the only creditor intended to be defrauded. *Schwacker v. Dempsey*, 83 Mo. App. 342.

- (d) *Admission of letter from assignee to contractor, if erroneous, is cured by instructions that assignee's right to payment is not affected by any arrangement between him and contractor, unless owner were a party to it.*

Admission of letter from assignee to the contractor as to the disposition of the moneys received by the former, if erroneous, is cured by an instruction that assignee's right to payment is not affected by any arrangement between the assignee and contractor, in relation to such disposition, unless the owner were a party to it. *Renton v. Monnier*, 77 Cal. 449, 19 P. 820.

- (e) *Instruction rendering immaterial extent of assignee's beneficial interest in action of trover.*

In trover by the assignee of the owner of the property, the question of the extent of the assignee's beneficial interest is rendered immaterial by a charge that the assignee could have no rights whatever over those of the owner, and would be affected with all his equities. *Hake v. Buell*, 50 Mich. 89, 14 N. W. 710.

Sec. 277. Attachment.

- (a) *Erroneous refusal to quash order of attachment where bond left possession unimpaired.*

Where the court erroneously refused to quash an order for attachment levied on a boat, on the ground that a bond had been made to the master, who had merely a right of possession, as well as to the owners, is harmless, where the owners, having given a forthcoming bond, the master was not de-

prived of possession. *Knox v. Atterbury*, 33 Ky. (3 Dana) 580.

(b) *Error in sustaining attachment after execution of bond insufficient to justify reversal.*

Though it is error for the court to make an order sustaining the attachment, after it has been discharged by the execution of a proper bond, yet, when no property was levied on under the attachment, but it was a mere garnishment of money, and no order was made or steps taken against the defendant and garnishee, and the order was not hurtful or prejudicial to the defendant, except as to the costs of the order, this is insufficient to justify a reversal. *Bromly v. Vinson*, 9 Ky. L. R. (abst.) 401.

(c) *Sale of property affirmed, though attachment void.*

As plaintiff was entitled to a sale of the attached property under the contract lien asserted by him, the fact that the attachment was void is not ground for reversal. *Settle v. Davis*, 14 Ky. L. R. (abst.) 718.

(d) *Nominal damages barred error in instructing jury as to priority in attachments.*

Where, in an action on an attachment bond, there is a question as to the priority of different attachments, but, in any event, plaintiff is entitled to nominal damages, and nominal damages only are allowed, the opposite party can not complain of error in instructions to the jury with reference to priority in the attachments. *Whitney v. Browenewell*, 71 Iowa 251.

(e) *Defendant can not assign as error question arising between plaintiff in attachment and a garnishee.*

Defendant in an attachment can not assign for error a decision on a question arising between the plaintiff and a garnishee. *Miere v. Brush*, 3 Scam. 21 (4 Ill.).

(f) *Sustaining attachment without decreeing sale of property.*

Appellant was not prejudiced by an order sustaining an attachment against another, without decreeing the sale of any property thereunder, especially when it does not appear that an attachment was ever levied upon any property belonging to appellant, or even that an attachment ever actually issued. *Caumiser v. Humpich*, 23 Ky. L. R. 1133, 64 S. W. 851.

(g) *Irregularity of officer making sale under wrongful attachment.*

In trespass against an officer for wrongfully attaching property on mesne process, error in allowing another officer, who sold the property on execution, to amend his return as to the date of the sale, for the purpose of making such execution competent evidence in the case, was harmless, since it would not be allowable for an irregularity of the officer who made the sale. *Paul v. Slason*, 22 Vt. 231, 54 Am. Dec. 75.

(h) *In attachment proceeding, it is not prejudicial error to permit defendant to amend his answer by alleging the filing of the affidavit and bond before the writ was issued.*

Defendant not being an assignee, and the justification of the sheriff, who has seized goods in the possession of one not a party to the writ, to whom the attachment debtor, the real owner, has transferred the goods in fraud of creditors, when sued, after the seizure, by the person from whose possession the goods were taken, to show the regularity of the proceeding before the issuance of the writ, it is not error prejudicial to plaintiff to permit defendant to amend his answer by alleging the filing of an affidavit and bond before the writ was issued. *Buddee v. Spangler*, 12 Col. 216, 20 P. 760.

- (i) *Testimony of attachment debtor as to good intent not prejudicial.*

In replevin against sheriff in possession of property under a writ of attachment, where the defense was that plaintiff's purchase from the attachment defendant was fraudulent, testimony of the attachment defendant that his purpose in selling the goods to plaintiff was to pay out to creditors as much as he got, and pay the rest as soon as he could get on his feet, was not prejudicial to plaintiff, as it did not show any purpose on the part of the attachment defendant to hinder or delay creditors. *Stern Auction Co. v. Mason*, 16 Mo. App. 473.

- (j) *In action on undertaking to release attachment, admitting certified copy of attachment in evidence.*

In an action upon an undertaking to release an attachment, the fact that the court allowed a certified copy of the attachment to be put in evidence, over objection that it had not been shown that the attachment had been granted, was harmless, as the undertaking itself was sufficient proof of that fact. *Christal v. Kelly*, 88 N. Y. 285.

Sec. 278. Bankruptcy.

- (a) *Error in bankruptcy case, where verdict brought case within the fiduciary clause of the bankrupt act.*

In an action to recover against a discharged bankrupt, the trial court's error in placing the case, on the ground that it came within the fiduciary clause of the bankrupt act, was harmless, where the verdict brought it within the fraud clause. *Hammond v. Noble*, 57 Vt. 193, rev. o. o. g. *Noble v. Hammon*, 129 U. S. 65, 32 L. ed. 621.

Sec. 279. Condemnation proceedings.

- (a) *In condemnation proceedings, where one has testified to the value of the land, excluding testimony as to value of sand thereon.*

In condemnation proceedings, where one has testified as to the value of the land, the exclusion of his testimony as to the value of the sand thereon, if error, is harmless. In re City of Buffalo, 18 N. Y. Supp. 771; In re Watson, Id.

- (b) *In condemnation proceedings, on sustaining challenge to array, judge erroneously designating twelve passers-by to act as jurors.*

Where, in condemnation proceedings, a challenge to the array had been sustained, the presiding judge erroneously designated twelve persons by name to act as jurors, instead of issuing a new venire, but the defendants did not claim that the jury, before whom the case was tried, after a challenge to the array had been denied, were prejudiced against defendants, or that they were not qualified, the error was harmless. Hartshorn v. R. Co., 216 Ill. 392, 75 N. E. 122.

- (c) *In condemnation proceedings, directing jury to assess damages for value of land when taken, instead of at date of commissioner's report.*

In condemnation proceedings, error, if any, in directing the jury to assess damages from the standpoint of the value of the land at the time of the taking, instead of at the time of the commissioner's report, was harmless, where the evidence showed that the value of the land was the same at both dates. R. Co. v. Stewart, 201 Mo. 491, 100 S. W. 583.

- (d) *In condemnation proceedings, evidence that road could have been built on another and different line in the village.*

Where, in a proceeding to condemn a railroad right of

way along a street, the jury found it necessary for petitioner to occupy the street as alleged, the admission of evidence that petitioner could have built its road on another and different line in the village, etc., was harmless. *R. Co. v. Anderson*, 146 Mich. 328, 109 N. W. 429, 13 D. L. N. 739, 8 L. R. A. n. s. 306, 117 Am. St. Rep. 642.

Sec. 280. Divorce.

- (a) *In divorce proceedings, conversation between the parties when no third party present, which did not affect the final result.*

Where evidence as to conversations between the parties, held when no third person was present, was admitted, which could not possibly have affected the final result, there was no ground for reversal. *Clarkson v. Clarkson*, 22 Mo. App. 236.

- (b) *In action for divorce for desertion, sustaining objection to question asked plaintiff, as to what reason he had to expect, after 18 years of separation, that defendant would again consent to live with him.*

In an action for divorce for desertion, the sustaining of an objection to the question asked of plaintiff, as to what reason he had for expecting, after 18 years of separation, that defendant would accede to his request and return and live with him again, was not prejudicial error. *McMullin v. McMullin*, 140 Cal. 112, 73 P. 808.

Sec. 281. Election contest.

- (a) *When errors in election contest are immaterial.*

The supreme court is not required to determine the correctness of the lower court's conclusions in an election contest that appellee was eligible to hold office, where, whether eligible or ineligible, the right result was reached, appellant

not being entitled to question his eligibility. *State, ex rel. Davis v. Johnson* (Ind. Sup.), 89 N. E. 393.

(b) *In election contest, re-submitting case without re-swearing jury.*

In mandamus to compel a justice of the peace to deliver to relator, a justice of the peace, the books belonging to the office, as successor to the office theretofore held by defendant, defendant, after relator had rested, moved to strike from relator's certificate of election, the portion purporting to show how he was elected to succeed, on the ground that the poll-books had not been read in evidence. The court set aside the submission and order submitting the case to the jury, and permitted the poll-books to be read in evidence, without re-swearing the jury. Held, that defendant was not prejudiced by the court's action. *Morris v. State, ex rel. Crawford*, 94 Ind. 565.

Sec. 282. Fines.

(a) *Fining an attorney for contempt in the presence of the jury not reversible error.*

The fining of an attorney, in the presence of the jury, for contempt, will not cause reversal, where his conduct was very aggravating, and the verdict showed that no prejudice resulted. *Stewart v. Beggs*, 56 Fla. 565, 47 S. 932.

(b) *Imposition of a less fine than authorized cured error.*

The imposition of a less fine than the law requires, in a case where the only punishment is a fine, is harmless error. *Ballard v. Chicago*, 69 Ill. App. 638.

Sec. 283. Insanity.

(a) *Exclusion of evidence as to insanity in family of deceased.*

In an action on an accident policy, where the defense was

suicide, the exclusion of evidence to the effect that there was insanity in the family of deceased, was not prejudicial error, the evidence being such as to warrant a finding of accidental death. *Surety Co. v. Goddard*, 25 Ky. L. R. 1035, 76 S. W. 832.

(b) *Exclusion of record of inquisition of lunacy as to witness.*

Where it was admitted that a witness offered was an inmate of an insane asylum, properly committed thereto, it was harmless error to exclude the record of the inquisition of lunacy as affecting the question of his competency. *R. Co. v. Thompson* (Ohio), 82 F. 720, 27 C. C. A. 333.

(d) *Refusal to permit ex parte affidavit and proceedings seeking to place a person in an insane asylum.*

Refusal to permit ex parte affidavit and proceedings to procure admission of person to insane asylum, not prejudicial, the same being shown by other evidence. *R. Co. v. Riley*, 39 Ind. 568.

(c) *Error in submitting to jury question of plaintiff's sanity, and whether contract was unconscionable.*

Where the plaintiff claimed that the contract made with defendants was unconscionable, and that when made he was insane, if the court erred in submitting to the jury the effect of insanity, and whether the contract was unconscionable, the error was not prejudicial, the jury being properly instructed to determine what plaintiff's services were reasonably worth, in doing what they did under the contract. *Dean v. Shattuck*, 56 Vt. 512.

(f) *In action involving lands, in which it was contended that plaintiff was insane when former judgment was rendered, error in judge finding her sane was immaterial.*

In an action involving lands, regarding which a former

judgment was rendered establishing the rights of the parties; defendants contended that plaintiff was insane when the former judgment was rendered, and that the trial judge in this case erred in finding that she then was sane. Held, that the error is immaterial, since if she were insane, the former judgment was not void, and would bind her in this suit. Judgm't 102 S. W. 436 affm'd, *Harris v. West* (Tex. Sup.), 105 S. W. 1118.

(g) *Proceeding with case, without substitution, after plaintiff became insane.*

If, on the trial of issues framed for a jury, on an appeal, it appears that the petitioner named as executor has become insane; on this fact being called to the attention of the presiding justice, the ordinary course of procedure would be for the justice to appoint some proper person to take the place of the petitioner in conducting the proceedings. If, however, the proceedings go on, without the disability of the petitioner being brought to the attention of the justice until after a verdict finding undue influence has been returned; but the counsel for the petitioner has continued to represent him with fidelity and ability, so that the beneficiaries under the will have suffered nothing from the lack of a formal appointment, there is no occasion for a new trial. *McKenna v. McArdle*, 191 Mass. 96.

Sec. 284. Matters of practice.

(a) *Improper procedure harmless where party not entitled to relief demanded.*

On a motion to vacate a former order of the judge dissolving an attachment, and order striking such motion and supporting affidavits from the files, if not a proper proceeding, will not be disturbed, if there was any sufficient showing to entitle the moving party to the relief demanded. *Bank v. Moorcroft Ranch Company*, 5 Wyo. 50, 36 P. 821.

- (b) *Practice prevails of treating facts as admitted by the parties without formal proof.*

In almost every trial there are necessary facts which the parties treat as admitted without formal proof. To make the absence of express proof, in such cases error, after verdict and judgment, would be unfair and greatly inconvenient. *Lewis v. Bank*, 12 O. 132.

- (c) *Erroneous but uninjurious matters of practice.*

Decisions upon mere matters of practice will not be disturbed, even if erroneous, unless it is apparent that injustice will likely result from adherence thereto, or that a change will not wrong. *Carr v. Closser*, 27 Mont. 94, 69 P. 560.

- (d) *Practice of several times repeating the contention of the parties, in charging the jury, not prejudicial.*

While the practice of several times repeating in extenso, the contention of the parties, in charging the jury, is not commendable, it is not prejudicial, where they are fairly and impartially stated. *R. Co. v. Pass* (Ga. Sup.), 70 S. E. 683.

- (e) *Practice of underscoring words and phrases in instructions held to be bad.*

The practice of underscoring words and phrases in instructions is bad, but will not reverse, where the underscoring is done in a general instruction, not involving specific facts, and appears to have been for the benefit rather than to the detriment of the complaining party. *Craw v. R. Co.*, 159 Ill. App. 100.

- (f) *Minor irregularities of pleading and practice disregarded.*

All minor irregularities of pleadings and practice should be disregarded for the purpose of ending painful and protracted litigation, and proof having been taken and the

case heard on the merits, it should be so considered on appeal. *Louisville Trust Co. v. Louisville Fire Proof Const. Co.*, 22 Ky. L. R. 433, 57 S. W. 506.

- (g) *Principal defendant not injured by erroneous issue of process against his trustee.*

The principal defendant is not harmed by erroneous issue of process against his trustee, who has not been properly served. *Whiting v. Cochran*, 9 Mass. 503.

Sec. 285. Public policy.

- (a) *Decision not contrary to public policy as encouraging celibacy.*

Appellants, who were married and not entitled to take under the will or as next of kin, were not prejudiced by a decision that a bequest of the remainder in an estate at the death of the life tenant to testatrix's nieces who might then be unmarried, was not contrary to public policy as encouraging celibacy. *In re Bacon's Est.*, 140 Wis. 589, 123 N. W. 262.

Sec. 286. Reference to master or referee.

- (a) *Refusal to refer a case to a master in chancery.*

The refusal to refer a case to a master in chancery is no ground for reversal, where there is nothing in the record to show that the appellant has been damaged thereby. *Genl. Fire Ex. Co. v. Lundell*, 66 Ill. App. 140.

- (b) *Sufficient competent evidence, aside from the incompetent, will sustain the finding of a referee.*

If there is sufficient competent evidence to sustain a finding of the referee, the fact that other and incompetent evidence to the same point was admitted is immaterial. *Davis v. Mendenhall*, 19 Minn. 149 (Gil. 113).

(c) *Immaterial evidence before a referee is not prejudicial.*

The admission of immaterial evidence does not constitute error calling for a reversal, where the trial was before a referee. *Sweet v. Henry*, 175 N. Y. 268, rev. 66 App. Div. 383, 106 St. Rep. 868, 72 N. Y. Supp. 868.

(d) *Reference of a question of fact to a master, which defendant admitted, was harmless.*

Reference to a master of question of fact which defendant admitted, held harmless, except in so far as it, in fact, increased the costs. *State v. Bolt* (Tenn. Sup.), 169 S. W. 761.

(e) *Conflict in the testimony will not disturb finding of a referee.*

Where there is simply a conflict in the testimony the finding of a referee will not be disturbed. *Wharton v. Hammond*, 20 Fla. 934.

(f) *Findings of fact by referee upheld as verdict of jury.*

A finding of fact by a referee has the same force and effect as the verdict of a jury, and will not be disturbed on appeal, unless clearly against the evidence. *Whicher v. Steamboat Ewing*, 21 Iowa 240. So of a master in stating an account, *Williams v. Landblom*, 163 Ill. 346.

(g) *Refusal by referee to find that easements had no value was cured by the record so showing.*

The error involved in a refusal by the referee to find that the easements had no value apart from the land itself; held cured, where the record showed only nominal value was awarded for the easements themselves. *Kahn v. R. Co.*, 7 Misc. 53, 57 State Rep. 509, 27 N. Y. Supp. 339.

(h) *Equity finding, approved by chancellor, will not be disturbed.*

Where a finding, one in equity, is that of a master who saw the witnesses and heard them testify, and approved by the chancellor, it will not be disturbed as against the weight of the evidence, unless it clearly is so. *Siegel v. Andrews & Co.*, 78 Ill. App. 611.

(i) *Verdict of jury or finding of a referee will not be set aside as against the weight of the evidence, unless preponderance is such as to indicate improper considerations.*

A verdict of a jury or finding of a referee will not be set aside, as against the weight of the evidence, unless its preponderance is such as to indicate considerations actuated other than due respect to the evidence. *Broward v. Roche*, 21 Fla. 465.

(j) *Failure of referee to report rulings on objections.*

Though many of the objections taken to the introduction of evidence before the referee might have been sustained, they will not work a reversal, where it appears from an examination of his report that his failure to report any ruling thereon did not appear to prejudice the relator on the merits, or that the result would have been different if such rulings had been reported by the referee. *State, ex rel. Tygard v. Elliott*, 82 Mo. App. 458.

(k) *Failure of referee to note on the margin of the propositions of law and facts submitted by defendant how they were disposed of.*

In view of Code of Civil Procedure, sec. 721, providing that a judgment shall not be impaired or affected because of the default or neglect of the clerk, or any other officer of the court, by which the adverse party has not been prej-

udiced, the failure of a referee to note on the margin of the propositions of law and facts submitted by defendant, the manner in which the propositions were disposed of, as required by Code of Civil Procedure, sec. 1023, if so required, was not reversible, where defendant was accorded all rights on appeal which he would have had, had the statute been strictly followed, and the judgment did justice between the parties. *Stickles v. Miller*, 128 N. Y. Supp. 487.

(l) *Where impossible to determine the correctness of a referee's report it will be upheld.*

Where it is impossible, from the evidence, to determine whether a referee's report was correct or not; held, that it would be allowed to stand. *In re Heath's Est.*, 58 Iowa 36.

Sec. 287. Remedy.

(a) *Where a right result is reached, inappropriateness of remedy is immaterial.*

Where the right result has been reached, the judgment will not be disturbed because an inappropriate remedy was employed. *Field v. Malone*, 102 Ind. 251, 1 N. E. 507; *Kemper v. Metzger*, 169 Ind. 112, 81 N. E. 663; *Akin v. Davis*, 11 Kan. 580.

CHAPTER XII.

JUDGMENT, BILL OF EXCEPTIONS, ERRORS, ETC.

- Sec. 288. Bill of exceptions.
- 289. Dismissals.
- 290. Errors.
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Sec. 288. Bill of exceptions.

- (a) *Where bill of exceptions becomes wholly immaterial to the merits of the case, it is no longer assignable as error.*

Where the matter of a bill of exceptions becomes wholly immaterial to the merits, as they are finally developed on the trial, it is no longer assignable as error, though the trial court may have ruled it out. *Greenleaf v. Birth*, 5 Peters (U. S.) (D. C.) 132, 8 L. ed. 132.

Sec. 289. Dismissals.

- (a) *Dismissal by circuit court of petition in error being, in effect, an affirmance, will be affirmed by supreme court, if record shows judgment of common pleas court to have been correct.*

If the judgment of the common pleas court is correct, as

shown by the record, and the action of the circuit court in dismissing the petition in error is, in effect, an affirmance of such judgment, same will be affirmed, whether or not the reasons given by the circuit court in dismissing the petition in error were correct. *Galbraith v. Glenn*, 87 O. S. 460.

(b) *In joint action against several defendants, some of whom successfully interposed statute of limitations, dismissal as to all will not be disturbed.*

In a joint action against several defendants, some of whom successfully plead the statute of limitations, a judgment dismissing the action as to all will not be disturbed. *Somers v. Florida Pebble Phos. Co.*, 50 Fla. 275.

(c) *Dismissal on motion for judgment on the pleadings will not be disturbed.*

Where it appeared that the plaintiff was not entitled to any relief on the pleadings; held, that the action of the lower court in dismissing a case on motion of defendant, after defendant's answer was on file, would not be reversed, although this might not be the proper method of reaching the objection at that stage of the pleading. *Hoag v. Madden*, 70 Iowa 612.

(d) *Judgment for defendant, instead of dismissal, not prejudicial error.*

A complaint referred to a contract on which the action was brought as an exhibit, but in the record on appeal no such exhibit appeared, and the terms of the original contract were not stated; and the answer set up a counterclaim on the contract, referring to it simply as to the one set out in the complaint, but did not state its terms. Held that, as the complaint stated no cause of action, and the answer no counterclaim, and neither party intro-

duced any evidence, the judgment should have been a dismissal of the action, with costs, but that the judgment for defendant for nominal damages, on his alleged counterclaim, was not prejudicial error. *Osborne v. Johnson*, 35 Minn. 300, 28 N. W. 510.

(e) *Erroneous dismissal of special plea as surplusage not ground to set aside the verdict.*

When there is a plea of the general issue, and also a special plea setting up matter of defense which might be proved under the general issue, and the court dismisses the special plea as surplusage, this is not such error as will require the verdict to be set aside; if the court, in fact, allowed the evidence under the plea of the general issue. *Insurance Co. v. Carrugi*, 41 Ga. 660.

(f) *On plaintiff's counsel's opening statement, dismissal, on motion, for not stating a cause of action, affirmed.*

Where it appears from the record that counsel for plaintiff in the statement of the case to the jury, stated in detail all the evidence that plaintiff proposed to offer in support of the allegations in his petition, and where it further appears that, after the sufficiency of his statement was challenged, he was given full and fair opportunity to explain and qualify his statement, and make such additions thereto as, in his opinion, the proof at his command would establish, and with such explanation and qualification as counsel desired to make, it is still apparent that the facts proposed to be proven would not sustain the essential averments of the petition, and would not authorize a verdict and judgment for plaintiff, it is the duty of the trial court to sustain a motion to withdraw the case from the jury and enter a judgment dismissing the plaintiff's petition and for costs. *Cornell v. Morrison*, 87 O. S. 215.

(g) *Objection to the dismissal of co-defendants.*

On appeal from a judgment for plaintiff, in an action for negligence brought against several defendants not associated in interest as to all, but as to some of whom the complaint was dismissed; held, that appellant could not prevail on an objection to such dismissal, unless it appeared that the accident was caused solely by the negligence of the other defendants, or one of them. *Lipp v. Otis Bros. & Co.*, 28 App. Div. 228, 51 N. Y. Supp. 13, rev. o. o. g. 161 N. Y. 559.

(h) *Refusal to dismiss cured by subsequent proof.*

Proof introduced after motion to dismiss complaint was overruled, the verdict will cure the error in refusing to grant the motion. *Lansing v. Van Alstyne*, 2 Wend. (N. Y.) 561; *Muskowitz v. Hornberger*, 20 Misc. 558, 46 N. Y. Supp. 462, rev. o. o. g. 19 Misc. 429, 43 N. Y. Supp. 1130; *Mayor, etc., of New York v. Wylie*, 43 Hun 547, affm'd, 122 N. Y. 663.

(i) *Refusal to dismiss wives as defendants.*

A homestead, subject to an invalid deed of trust, was conveyed to F, who, as a part of the consideration, assumed and agreed to pay the debt secured by the lien. Thereafter suit was brought on the debt and to foreclose the lien against the grantor in the deed, and his wife and F and wife, but no personal judgment was rendered against the wife of either the original grantor or F. Held, that the refusal of the court to dismiss such female defendants from the case was not reversible error. *Fontaine v. Nuse* (Tex. Civ. App.), 85 S. W. 852.

(j) *Dismissing complaint, on motion of defendant, on the merits, was only error of form.*

On a trial before a jury, after both sides had rested, the court, on motion of the defendant, dismissed the

complaint, subsequently amending the order by adding, "on the merits." Held that, strictly speaking, a complaint can not be dismissed on the merits in an action at law, on a trial before a jury, the direction of a verdict for defendant being the proper method, but the error was only one of form, the judgment roll showing that both sides had rested when judgment was rendered, and that the defense was of a character to defeat the cause of action. Order of said court, 121 N. Y. Supp. 93, 65 Misc. Rep. 625, affm'd, Strodl v. Faris-Stafford Co., 122 N. Y. Supp. 609, 67 Misc. Rep. 402.

Sec. 290. Errors.

(a) *Error in excluding certificate of cashier cured by instruction.*

Error in excluding, in an action on an indemnity bond of a company president, a certificate of the cashier, made in answer to an inquiry by the surety company, that the president "has performed his duty in an acceptable manner, and we know of no reason why the guaranty bond should not be continued," with evidence tending to establish that the giving of the certificate was an act done in the course of business, and will not require a reversal of the judgment against the surety company, where the jury were charged that if they could deduce from the evidence knowledge on the part of the bank of the fraud of the president, the surety company would not be liable, and the acts of the president were not of such a character as to preclude, as a matter of law, the possibility of a belief by the directors and other officers in the sufficiency of the bond. Judgm't, 43 C. C. A. 331, 103 F. 599, affm'd, Bank v. Courtney (Ky.), 186 U. S. 342, 46 L. ed. 1193.

(b) *Entering judgment against garnishee before judgment against defendant only a clerical error.*

Entering a judgment against a garnishee before judg-

ment against the defendant is to be regarded after judgment against the latter as only a clerical error, and not a cause for reversing the judgment against the judgment debtor. *Carper v. Richards*, 13 O. S. 219.

(c) *Neither allowance of improper nor disallowance of proper questions constitute error, where no proper evidence was excluded nor improper admitted.*

Neither the allowance of improper questions nor the disallowance of proper ones, is ground of error, where no proper evidence is excluded nor any improper evidence admitted. *R. Co. v. Van Vleck*, 143 Ill. 480.

(d) *Error cured in admitting evidence of other fires by special verdict.*

In an action for damages from fire started by defendant's engine, error in admitting evidence of other fires started by defendant's engine is harmless, when the special verdict finds no facts concerning any defects in construction or negligence in operation of the engines. *R. Co. v. Ind. Horse Shoe Co.*, 154 Ind. 322, 56 N. E. 766.

(e) *Error in admitting declaration in a will contest, without laying a foundation therefor.*

Where the contesting witness had testified that after the will was executed, the widow requested him to see testator and have him make the will more favorable to her, and that he did see testator, and testator declined to change the will in any respect, it was error to permit contestants, without laying any foundation therefor, to prove a declaration by the contesting witness, to the effect that when he saw testator, in compliance with the widow's request, testator said not a word in answer to his inquiry, "Have you got everything arranged like you want it?" and that he believed testator had it just like

he wanted it, but the error was harmless. *Murphy's Ex'r v. Murphy*, 23 Ky. L. R. 1460, 65 S. W. 165.

(f) *Not prejudicial error to allow former testimony of deceased plaintiff and deceased defendant to be read in evidence.*

Where a defendant in an action died between the first and second trials, it was not prejudicial error to allow his testimony on the former trial to be read in evidence as to his transactions with one, also deceased, where the testimony of the other as to such transactions was also read, and there was no conflict between their testimony, and it was confirmed by other evidence and uncontroverted. *Columbia Finance & Trust Co. v. Mitchell's Adm'r*, 24 Ky. L. R. 1844, 72 S. W. 350.

(g) *In action for libel, harmless error in admitting judgment showing plaintiff was clerk of the penitentiary.*

In an action for libel based upon a newspaper publication, referring to plaintiff as ex-clerk of the penitentiary, and stating that an expert accountant had found him to be short in his accounts, the error in admitting as evidence a judgment to the effect that plaintiff was clerk of the penitentiary when the publication complained of was made, was harmless, as the court, under the other proof in the case, could have told the jury, as a matter of law, that plaintiff was clerk of the penitentiary at the time of the publication complained of. *Evening Post Co. v. Canfield*, 23 Ky. L. R. 2028, 66 S. W. 502.

(h) *Error in permitting next friend to testify.*

In an action by a next friend, the error, if any, in permitting the next friend to testify, after other witnesses had testified on the trial, was harmless, as the testimony related only to the extent of the injury, which was

already shown by other evidence. *Whitman McNamara Tobacco Co. v. Wurm*, 23 Ky. L. R. 2420, 66 S. W. 609.

(i) *Error in admitting evidence of the force with which logs started down stream on opening dam.*

In an action for injury to land in causing saw-logs to drift thereon, testimony by a witness who had operated a dam on another stream, as to the force with which he had seen logs start down by the opening of such dam, though incompetent, was not prejudicial, where there was evidence showing the effect of opening its dam to be substantially the same. *Ford Lumber & Mfg. Co. v. Clark*, 24 Ky. L. R. 318, 68 S. W. 443.

(j) *Error in ruling out evidence of defendant cured by plaintiff withdrawing objection.*

Error of the court in ruling out evidence offered by defendant when presenting his defense in chief, tending to show that the contract sued on had been performed by plaintiff, was cured by the act of plaintiff in withdrawing his objection to the evidence before the case was submitted to the jury. Defendant's failure to introduce evidence after the objection was withdrawn is not excused by his saying that he had closed his defense. *Price v. Haeberle*, 25 Mo. App. 201.

(k) *Ruling out cross-examination contradicting evidence in chief insufficient to base error on.*

Where questions on cross-examination are asked for the purpose of eliciting certain information in the nature of a contradiction of the testimony in chief and ruled out on objections, and the evidence sought is afterwards established by other uncontradicted evidence, error can not be predicated on the ruling of the court regarding such cross-examination. *R. Co. v. Fox*, 60 Neb. 531, 83 N. W. 744.

- (l) *Error as to boundaries of land conveyed not prejudicial to defendant.*

Where, in ejectment, by one claiming title through a conveyance from defendant, it appeared that defendant had conveyed fifty acres; that thirty-three acres had been in the actual possession of the grantee, and those claiming under him since the conveyance, and that the balance of the tract had been in possession of the defendant, because of a mistake as to the east boundary line, the error, if any, in permitting the plaintiff to prove that the boundaries of the land conveyed by defendant would be the same on the south and west sides of it, whether it contained fifty or only thirty-three acres, was not prejudicial to defendant. *Schanbrich v. Dillemoth*, 108 Va. 85, 60 S. E. 745.

- (m) *Error for plaintiff immaterial where, on undisputed facts, case is plainly for defendants.*

Where, on the undisputed facts, a case is plainly for defendants, the errors committed by the court on the trial are harmless, so far as the plaintiff is concerned. *Davis v. Living*, 50 W. Va. 451, 40 S. E. 365.

- (n) *Error in allowing witness to testify to life of timber used in railroad piers.*

Any error in allowing a witness for plaintiff, in an action for injury to one working in renovating a railroad pier, to testify as to the usual life of timber exposed as that was, is harmless, the evidence showing that the timber in the pier was, at the time of the accident, in large part, utterly rotten and worthless. *R. Co. v. Hoffman*, 109 Va. 44, 63 S. E. 432.

- (o) *Error in admitting or excluding testimony, which did not affect the result or prejudice appellant.*

A cause will not be reversed for an error in admitting

or excluding testimony, where it does not appear that the error affected the result or prejudiced the appellant. *Willis v. Chambers*, 8 Texas 150; *Nicholson v. Horton*, 23 Texas, 47.

(p) *Error in libel case in expunging matter from paragraph admitted in evidence.*

Any error against defendant in libel in expunging matter from a paragraph admitted in evidence was harmless, where the matter contained allusions which would have tended to inflame the jury against him. (N. Y.) *Mann v. Dempster*, 181 F. 76, 104 C. C. A. 110.

(q) *Error in refusing full cross-examination and requiring testimony to be put in upon direct examination.*

The defendant was called as a witness for the plaintiff, but the trial court refused to allow a full cross-examination, upon the ground that the evidence might be put in upon the defense. He was afterwards called on his own behalf and testified at length. Held, that the error, if any, in requiring the testimony to be put in upon direct examination was not sufficient to work a reversal. *Lustig v. McCullough*, 10 Col. App. 41, 50 P. 48.

(r) *Error in allowing witness to answer question, "Did you know to whom the article related?"*

In an action for libel, alleged error in allowing the witness to answer question, "Did you know to whom the article related?" does not prejudice the defendant, when there was no dispute as to the identity of the person referred to, and no evidence that the article could apply to any other person than the plaintiff, when defendant permitted testimony as to facts conclusively identifying the plaintiff as the person referred to in the libel, to be received without objection or contradiction, when defendant permitted the court to charge that plaintiff was

the person referred to without excepting to the charge. *Smith v. Sun Printing & Pub. Ass'n (N. Y.)*, 55 Fed. 240, 5 C. C. A. 91, *affm'g*, C. C. 50 F. 399.

(s) *Error from answer to improper question is harmless, unless the contrary be shown.*

If, conceding that the question was improper, to which an objection was overruled, the error is presumed to be harmless, unless the answer, by physical illustration is shown by the record to have been detrimental to the party making objections. *State v. Buralli*, 27 Nev. 41, 71 P. 532.

(u) *Error in admitting evidence cured by restricting application to question upon which there was ample evidence.*

Error in admitting evidence is harmless, where the court restricted its consideration to the question whether a certain payment had been made, and there is ample evidence to support the finding that it had not been made. *Wolf v. Chapman*, 7 Col. App. 179, 42 P. 1018.

(v) *Error in admitting evidence cured by limiting to purpose which could not have prejudiced adverse party.*

Possible error in the admission of evidence is cured by limiting it to a purpose which could not have prejudiced the adverse party. *Runnels v. Village of Pentwater (Mich.)*, 67 N. W. 558.

(w) *Error in admitting evidence treated by instruction as immaterial.*

Error in the admission of evidence that becomes immaterial under an instruction is not ground for complaint. *Pope v. Machias Water-Power & Mill Co.*, 52 Mo. 535; *Wreggitt v. Barnett*, 99 Mich. 477, 58 N. W. 467.

- (x) *Error in rejecting telegram harmless, where they merely confirm an existing power.*

The error, if any, in rejecting telegrams offered for the purpose of showing ratification of a certain power of attorney is harmless, where such telegrams merely called for the confirmation and amplification of an existing power. *Runkle v. Burnham* (N. J.), 153 U. S. 216, 38 L. ed. 694.

- (y) *No reversal for error, where proper charge on the admission of the evidence would not have changed the result.*

Where it clearly appears that competent and relevant testimony rejected by the court below could not have changed the result if it had been admitted, a reversal will be refused, but the application of the rule involves a grave responsibility, and it will not be applied unless it clearly appears that the evidence rejected can be of no avail. *Davis v. Davis*, 6 Lea (Tenn.) 543; *Douglas v. Neil*, 7 Heiskel (Tenn.) 437.

- (z) *Clerical error in failing to enter judgment.*

The record of the court showed that a writ of error had been sued out, to which there was a plea and demurrer, but it contained no entry of judgment. It further showed that the case was filed in the superior court, and a decision was handed down reversing the judgment and entering judgment on the verdict for plaintiff. On appeal from a scire facias issued on the judgment, the clerical defect in the record was assigned as error. Bill dismissed. *Shaw v. Boyd*, 12 Pa. 215.

- (a-1) *Party not having a case not injured by error.*

A party who fails to make out a case to the jury is not injured by error, if the error does not prevent him from making out such case. *Hebrard v. Jefferson Gold*, etc., Min. Co., 33 Cal. 290; *Hinds v. Keith* (Ala.), 6 C.

C. A. 231; Aisher v. City of Denver, 10 Col. App. 413, 52 P. 56; Baker v. Deane, 69 Ill. 613; Gilbert v. Allen, 57 Ind. 524; King & Co. v. Green, 38 Ind. App. 207, 78 N. E. 88; Hullett v. Baker, 101 Tenn. 689, 49 S. W. 757; Lemons v. State, 97 Tenn. 560, 37 S. W. 552; Williams v. Bank, 1 Coldwell (Tenn.) 44.

(b-1) *Minor errors unimportant.*

A judgment will not be reversed because of error in a minor point of practice, where it is not apparent that injury has been done by such ruling. Whitman v. Meissner, 34 Ind. 487; Dangel v. Levi, 1 Ida. 722.

(c-1) *Two paragraphs good, error as to the other two immaterial.*

Where two of four paragraphs in a complaint are sufficient, and the facts found in a special verdict are applicable to the issues joined in these paragraphs, an error in overruling a demurrer to the other two paragraphs is harmless. R. Co. v. Gregor, 150 Ind. 625, 50 N. E. 760.

(d-1) *Errors on one side offsetting those on the other.*

Where errors have been committed against both appellant and appellee, each offset each other, the judgment will be affirmed. McCormick v. McCormick, 6 Ky. L. R. (Superior Court, Abst.) 585; Wilson v. Bryan, 13 Ky. L. R. 417, 17 S. W. 280.

(e-1) *Errors not affecting substantial rights.*

A judgment in attachment will not be reversed, when properly decided, when the only errors relied on are defects in the affidavit upon which the order of attachment was issued, and such defects do not affect the substantial rights of the appellant. Ryon v. Bean, 59 Ky. (2 Metc.) 137.

(f-1) *Erroneous decisions, where each party is similarly prejudiced, will not be disturbed.*

Where decisions of the lower court are erroneous, and each party is prejudiced by them in about the same degree, and several parties and witnesses have died, the court of appeals will forbear to disturb the decisions of the court below on these points. *Anderson v. Mason*, 36 Ky. (6 Dana) 217.

(g-1) *Error being prejudicial to creditor, debtor can not complain.*

Partial payments on a debt bearing interest must, in a suit, be first applied to the extinction of the interest that is due. It was therefore error in this case to add together the principal and interest thereon, and deduct therefrom the credits, with interest on each from the time of payment; but as the error was prejudicial to the creditors the debtor can not complain. *Henderson Cotton Mfg. Co. v. Lowell Mach. Shops*, 86 Ky. 658, 7 S. W. 142, 9 Ky. L. R. 831.

(h-1) *An error apparent on the face of the record will not affect the judgment unless it entered into the judgment or finding of those facts on which the judgment necessarily rests.*

Selleck v. Rusco, 46 Conn. 373.

General Statutes, sec. 1135, makes it the duty of the supreme court not to reverse a judgment for errors which are immaterial or which do not injuriously affect the appellant. *Barney v. Brannan*, 51 Conn. 175.

(i-1) *If there be no error apparent on the record the judgment will be affirmed.*

If there be no error apparent on the record the court will affirm the judgment, though it is difficult to see from the record how the trial court came to the conclusion of

fact which it reached. *Throckmorton v. Chapman*, 65 Conn. 442.

(j-1) *Party can not complain of error which does not affect him.*

Where defendant has suffered a decree pro confesso to be taken, he can not assign for error that the evidence was taken before service of summons, as the error does not affect defendant. *Agnew v. Fultz*, 119 Ill. 296.

(k-1) *Error in one count immaterial when recovery had on another.*

A judgment will not be reversed because of a clerical error in a single count, where there has been a proper recovery on another count. *Monmouth Mining Co. v. Ebling*, 45 Ill. App. 411.

(l-1) *Error can not be predicated on evidence identical with that already admitted without objection.*

Error can not be predicated on the admission of testimony identical with that already admitted without objection. *Olmstead v. City of Red Cloud*, 86 Neb. 528, 125 N. W. 1101.

(m-1) *Where error complained of actually benefited complaining party.*

Error which affirmatively appears to have benefited the party complaining can not serve to reverse a case. *Beyer v. R. Co.*, 114 Ala. 424, 21 S. 952; *People v. Cough Est.*, 16 Col. App. 120, 63 P. 1066; *Bethel v. Matthews*, 80 U. S. (13 Wall.) 1, 20 L. ed. 556; *Smith v. Lyon*, 44 Conn. 175; *McCook v. Harp*, 81 Ga. 229, 7 S. E. 174; *Emory v. Owings*, 3 Md. 178; *McNulty v. Lewis*, 16 Miss. (8 Smedes & Marshall's) 520; *Waterhouse v. Freeman*, 13 Wis. 339.

(n-1) *Error cured by failure to file a reply.*

Where a party, by his failure to reply, admits the facts alleged he can not be injured by the court allowing to be read in evidence the deposition taken in the case prior to the time of his becoming a party, because no proof against him was necessary. *Dowdy v. Preston*, 3 Ky. L. R. (abst.) 760.

(o-1) *Error in bringing suit against more than one stockholder to enforce unpaid subscriptions.*

Error in bringing suit against more than one stockholder to enforce payment of his unpaid subscription, in order to subject defendant to a claim of a creditor is harmless, the liability thus being apportioned among the different stockholders, instead of being enforced altogether against one. *Leucke v. Tredway*, 45 Mo. App. 507.

(p-1) *Not reversible error for court to fail to point out the distinction by which certain evidence affected the measure of damages and not the right of action.*

It is not error sufficient for a reversal of the judgment that the judge did not point out a distinction by which certain evidence affected the measure of damages and not the right of action. *Huber v. Wilson*, 23 Pa. St. (11 Harris) 178.

(q-1) *Error can not be based upon an unnecessary instruction.*

Error may not be assigned upon the giving of a merely unnecessary instruction. *No. 5 Mining Co. v. Bruce*, 4 Col. 293.

(r-1) *Error cured by instructing jury to disregard withdrawn improper evidence.*

Error in the admission of improper evidence is cured,

where it is afterwards withdrawn and the jury instructed to disregard it. *Zehner v. Kepler*, 16 Ind. 290; *R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301.

(s-1) *Error as to probable cause cured by instruction that evidence did not show any.*

Error of the trial judge in charging as to what constitutes probable cause for a criminal prosecution is immaterial, where he properly charged that the evidence did not show probable cause. *Hazzard v. Flury*, 120 N. Y. 223, 30 State Rep. 906.

(t-1) *Error in legal proposition harmless if finding of facts right.*

Where the court above may review the facts, the court will not reverse them for error in holding upon a legal proposition, if the finding upon the facts is clearly right; the error is harmless. *Caledburg 1st Nat. Bank v. Clark*, 143 Ill. 83.

(u-1) *Error in establishing a fact not in issue.*

Where there is no issue as to a fact, the admission of evidence tending to establish the same is not error of which a party can complain. *Dodge v. Chandler*, 13 Minn. 114 (Gil. 105).

(v-1) *Error against a party on one point, and jury find special verdict against him on a separate point, the error is cured.*

Where error is made against a party on one point, but the jury find a special verdict against him on a separate point, the error is thereby cured. *Davis v. Judge*, 46 Vt. 655.

(w-1) *Error harmless where the verdict is for less than warranted by the evidence.*

Where a cause of action is stated against a municipality and the uncontradicted evidence shows liability for whatever damages resulted, and also that the plaintiff suffered greater damages than were allowed him by the jury, errors of law in the charge to the jury or in the admission of evidence become immaterial. *Cincinnati v. Roettinger*, 11 O. C. C. n. s. 501, 21 O. C. D. 252, affm'd w. o. 83 O. S. 519.

(x-1) *Error in sustaining one defense harmless when another bars the action.*

If the court erred in sustaining one defense, the error is not prejudicial if the record shows that another defense (e. g., the statute of limitations) is good. *Holt v. Lamb*, 17 O. S. 374.

(y-1) *Alleged errors in immaterial findings of fact will not be considered on appeal.*

Alleged errors in immaterial findings of facts will not be considered on appeal. *Klockenbaum v. Pierson*, 22 Cal. 160; *Dougherty v. Coffin*, 69 Cal. 456, 10 P. 672; *Sherman v. Sanders*, 106 Cal. 373, 39 P. 797. •

(z-1) *Error in awarding child to mother not prejudicial to husband.*

A couple lived together as man and wife after having been divorced. The wife, believing herself remarried, applied for a second divorce, and obtained an order awarding her the custody of the child that had been awarded to her in the first divorce proceeding. Held, that the husband was not prejudiced by the order. *Gibson v. Gibson*, 18 Wash. 489, 51 P. 1041.

(a-2) *Error in sustaining motion to divide paragraph immaterial.*

Although it is error in the court to sustain a motion to divide a paragraph that contains but a single answer to the complaint, such error is not material if the paragraph divided was, as a whole, an insufficient defense to the complaint. *Conwell v. President, etc., of Connersville*, 8 Ind. 358.

(b-2) *Where one paragraph included the second, and court charged as though there were but one, error immaterial.*

Where the second paragraph of a complaint repeats the allegations of the first and makes certain additional ones, but the court charged as if there were only one paragraph, and the special verdict contained a finding only on the matters tendered in the first paragraph, it need not be considered on appeal whether or not the second paragraph was good; since, if it was bad, the overruling of a demurrer thereto would be harmless. *R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345.

(c-2) *In order to show error was harmless it must clearly appear that the substantial rights of the parties were unaffected.*

The provision of the statute that the court must disregard any error, irregularity, or omission which does not affect the substantial rights of a party to the proceeding, does not authorize a court to dispense with proof of the several acts which the suit has made requisite, or to assume that the omission of said acts or any other error was harmless; and it is not sufficient that any error or omission may not have affected the substantial rights of the parties, but it must clearly appear that it has not affected them. *Directors of Fallbrook Inn. Dist. v. Abila*, 106 Cal. 365, 39 P. 793.

(d-2) *Error cured by subsequent proceedings during the trial.*

The general rule is, if error intervenes, the judgment must be reversed; but if, during subsequent proceedings of the trial, the foundation of the error is overthrown and facts are shown which support the ruling of the court the error is cured. *People v. Anderson*, 26 Cal. 130.

(e-2) *Error against a party cured by verdict in his favor.*

Errors committed against a party are cured by a verdict in his favor. *Herman v. Marks* (Iowa Sup.), 147 N. W. 740.

(f-2) *Error affecting judgment against a defendant not appearing not available to his co-defendants, or a part of them.*

Upon an appeal by a part of the defendants against a judgment is rendered error in the judgment affecting only a defendant not appearing, will not be considered. *Teller v. Hartman*, 16 Col. 447, 27 P. 947.

Sec. 291. Exceptions.

(a) *Exception inconsistent with theory on which case is tried and decided not considered.*

Where it is manifest that the general verdict was rendered on a particular theory of the facts, rulings and exceptions which could not in any way affect that theory, will not be considered. *Kraemer v. Duesterman*, 40 Minn. 469, 42 N. W. 297.

Sec. 292. Execution.

(a) *Issuance of second execution harmless.*

The issuance of a second execution on a judgment is harmless, where the first has been returned prior to the

issuance of the second, and no harm has resulted to defendants, except by reason of the additional cost incident thereto. *Phillips v. Evans*, 64 Mo. 17.

(b) *Execution in replevin was error not prejudicial to plaintiff.*

Where, in replevin, plaintiff obtained possession of the property and judgment was rendered for defendants, and the execution provided that if defendants elected to take the property and plaintiff did not deliver it within ten days, the sheriff should take it and deliver it to defendants, or if he failed to do so, its value should be made out of the goods of the plaintiff and his surety, as plaintiff had no right to retain the property by paying the value, there was no error in the execution prejudicial to plaintiff. *Koelling v. August Gast Bank Note Co.*, 103 Mo. App. 98, 77 S. W. 474.

Sec. 293. Judgments.

(a) *Refusal to strike answer disclaiming interest in judgment harmless, as one payment of judgment released from all liability.*

In an action on a judgment in favor of a certain corporation made a party defendant by the plaintiff, plaintiff alleged that it was absolute owner of the judgment by virtue of certain transfers through receivers appointed for the corporation, though the judgment was not assigned in the record. Held, that a refusal to strike the answer of the corporation that obtained the judgment, in which it disclaimed interest therein, was not prejudicial to the judgment debtor, his interest not being affected thereby, as one payment of the judgment would release him from all liability. *McCardle v. Aultman Co.*, 31 Ind. App. 63, 67 N. E. 236.

(b) *Rejoinder to reply and issue thereon, where judgment right, will not be reversed because unauthorized.*

Although no provision is made for a rejoinder to a reply, upon issue thereon, and a general finding upon the evidence, the supreme court will not reverse a judgment rendering substantial justice in the premises. Chapter v. Williams, 21 Kan. 109.

(c) *Good paragraph of complaint sustains judgment, bad paragraph immaterial.*

Where the special findings show that the judgment rests upon a good paragraph of complaint, there will be no reversal, although another paragraph may be insufficient. R. Co. v. Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 354; Nixon v. Campbell, 106 Ind. 47, 4 N. E. 296, 7 N. E. 258; R. Co. v. Van Slike, 107 Ind. 480, 8 N. E. 269; Puterbough v. Puterbough, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

(d) *Judgment for defendant will not be disturbed because the answer in set-off is defective.*

Where the action is to recover a money judgment, and there is a finding for the defendant, the case will not be reversed because an answer in set-off is defective, when the amount claimed in the set-off is so small that the finding for the defendant could not have been upon that answer. Denman v. McMahan, 37 Ind. 241.

(e) *Judgment will not be disturbed for unprejudicial errors in pleadings and proceedings.*

For errors and defects in the pleadings and proceedings which do not affect the substantial rights of the party complaining, a judgment will not be reversed. Dangel v. Levy, 1 Idaho 722; Smith v. Ellis, 7 Ida. 196, 61 P. 695.

- (f) *Error in holding paragraph of answer sufficient harmless where judgment is right.*

Where the conclusion reached upon the merits of the case is correct, error in holding a defective paragraph of the answer sufficient is harmless. *State, ex rel. Davis, v. Bd. of Com'rs, Newton County, 165 Ind. 262, 74 N. E. 1091.*

- (g) *Where judgment right on original complaint, the failure to prove allegations of supplemental complaint not reversible error.*

Where the judgment is right on the original complaint, the failure of plaintiff to prove the allegations of his supplemental complaint is not reversible error. *Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184.*

- (h) *Judgment not warranted by pleadings sometimes considered a mere irregularity.*

When a judgment is not warranted by the pleadings, but is of such a nature that it can not affect the party complaining, it will be considered a mere irregularity, and no case for reversal. *Norvell v. Phillips, 46 Texas 162.*

- (i) *A judgment will not be reversed because the form of the action was misconceived.*

A judgment will not be reversed because the form of the action was misconceived, in case the facts are substantially alleged which the party was bound to prove on the trial to entitle him to recover. *Taylor v. Browder, 1 O. S. 226.*

- (j) *Where judgment is given on plea of payment, overruling of demurrer to separate answer of female defendant setting up coverture is harmless.*

Where, in an action on a note, defendants filed a gen-

eral and several answer pleading payment, on which the jury found in their favor, the overruling of a demurrer to the separate answer of the female defendant alleging coverture, etc., if error, was harmless to plaintiff. *Steely v. Seward*, 34 Ind App. 398, 73 N. E. 139.

- (k) *Where one of several demurrers was erroneously overruled, but remainder were properly overruled, the judgment should be affirmed.*

Where several defenses, each complete, in itself, have been pleaded, and demurrer to each of them has been overruled, and judgment rendered for the defendant, and on petition in error the circuit court finds that there was error in overruling a demurrer as to one, but that it was properly overruled as to the others, the circuit court should affirm the judgment. *Bd. of Education v. Walker*, 71 O. S. 169.

- (l) *Where demurrer to complaint is improperly overruled, judgment for defendant makes subsequent errors unimportant.*

Where a demurrer to a complaint, which is insufficient for want of facts, is overruled, and the cause is tried and defendant recovers judgment, errors made after the ruling on the demurrer are harmless. *Butler v. R. Co.*, 18 Ind. App. 656, 46 N. E. 92.

- (m) *Overruling of demurrer to paragraph of answer harmless, where finding and judgment was on cross-complaint.*

The overruling of a demurrer to a paragraph of the answer was harmless, where the finding and judgment was on the cross-complaint. *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

- (n) *Overruling demurrer to answer harmless when judgment is for defendant.*

Plaintiff sued to recover for certain shingles sold to defendant, who answered setting up a garnishment. Plaintiff demurred, and assigned as error the overruling of his demurrer to the answer. Overruling the demurrer did not prevent plaintiff from proving the material allegations of the complaint. The special verdict on the issues presented by plaintiff were for defendant. Held, that the ruling on the demurrer, if error, was harmless. *Alberts v. Baker*, 21 Ind. App. 373, 52 N. E. 469.

- (o) *In action for negligence, a judgment for defendant will not be reversed for technical error in overruling demurrer to answer, where no injury to plaintiff is shown therefrom.*

In an action to recover damages for negligence, a judgment in favor of the defendant on the first ground of his answer will not be reversed, if it appears from the record that no injury resulted to the plaintiff from the ruling, and that the action was fairly tried upon the merits upon the issues raised by the pleading. *Jaeger v. Cal. Bridge Co.*, 104 Cal. 542, 38 P. 413.

- (p) *Judgment unaffected by defect of parties defendant.*

Where a complaint, in an action to foreclose a mechanic's lien, states that defendant firm was composed of certain persons, the error is not ground of reversal, when the only personal judgment recovered was against one who signed the contract in his individual capacity. *Judgm't*, 66 N. Y. Supp. 286, 54 App. Div. 621, *affm'd*. *Fisher v. Jordan*, 169 N. Y. 615, 62 N. E. 1095.

- (q) *Irrelevant and redundant matter in a petition will not reverse a judgment.*

The supreme court will not reverse a judgment merely

because the petition may contain irrelevant and redundant matter. *Sample v. Sample*, 34 Kan. 73, 8 P. 248.

(r) *A correct judgment will not be reversed because of an erroneous ruling.*

Where a legally correct decision has resulted from an erroneous ruling, a reversal of the judgment should not be made unless a party has been misled to his injury from the ruling. *Schwann v. Clark*, 9 Misc. 117, 59 St. Rep. 706, 29 N. Y. Supp. 289, affm'g, 7 Misc. 242, 58 St. Rep. 24, 27 N. Y. Supp. 262; *Thiebaud v. Tait*, 138 Ind. 238, 36 N. E. 525; *Conway v. Day*, 79 Ind. 318; *City of Logansport v. Jordan*, 171 Ind. 121, 85 N. E. 959.

(s) *A judgment will not be reversed for correcting Christian name of a party.*

Where a party is fully described in the pleading a judgment will not be reversed because a plea was changed by correcting a mistake in the Christian name of such party. *Dewey v. McLain*, 7 Kan. 126.

(t) *A judgment will not be reversed on the ground of the incompetency of a juror.*

As a verdict of nine competent jurors is sufficient; where ten competent jurors concur in a verdict, the judgment will not be reversed because of the incompetency in another juror. *Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 990.

(u) *Judgment affirmed unless burden of proof unmistakably opposed to it.*

A judgment will not be reversed for want of evidence, unless the burden of proof is plainly and unmistakably opposed to it. *Flannagan v. Edwards*, 36 Neb. 359, 54 N. W. 565.

(v) *When judgment not based on improperly admitted evidence its admission was harmless.*

Where, on a writ of error in a suit to enforce a finding of the Interstate Commerce Commission, the record affirmatively showed that neither the commission nor the circuit court based any part of the judgment sought to be reviewed on certain evidence admitted over objection, the admission of such evidence was harmless. (Ill.) *St. Louis Hay & Grain Co. v. R. Co.*, 149 F. 609, affm'd, 153 F. 728, 82 C. C. A. 614, judgm't rev. o. o. g. 214 U. S. 297; *McLennan v. Bank*, 87 Cal. 569, 75 P. 760; See *v. Stiles*, 21 Conn. 505; *Bridier v. Yule*, 9 Fla. 481; *Wiener v. Nachbuer*, 38 Ill. App. 527; *Parker v. State, ex rel. Town*, 8 Black. (Ind.) 292; *Louisville & S. I. Traction Co. v. Worrell*, 86 N. E. 78; *Green v. R. Co.*, 5 O. C. C. n. s. 497, 16 O. C. D. 609.

(w) *To reverse as against the weight of the evidence the judgment must be totally unsupported.*

A verdict will not be set aside by the appellate court unless so unsupported by or so against the decided weight of the evidence as to show misapprehension, mistake or bias, or wilful disregard of duty. *Insurance Co. v. Carnahan*, 19 O. C. C. 114, 10 O. C. D. 186; rev. on other grounds, 63 O. S. 258; *Jarmush v. Iron Co.*, 3 O. C. C. n. s. 1, 13 O. C. D. 122.

(x) *Where the court below gave credit to one witness, corroborated by another, rather than to two who had sworn falsely, this court is not required to set aside the action of both court and jury.*

Where the court below gave credit to one witness, corroborated by another, rather than to two witnesses who had sworn falsely to the incident of the voyage, and to one whose statements bore internal evidence of in-

correctness, and refused to set aside the verdict of the jury, the case does not require this court to set aside the action of both court and jury. *Schultz v. Insurance Co.*, 14 Fla. 73.

- (y) *Where undisputed testimony of defendant showed a counterclaim exceeding amount claimed by plaintiff, and the judgment is for defendant for costs, alleged errors for plaintiff immaterial.*

Where the undisputed testimony of defendant established a counterclaim exceeding the amount claimed by plaintiff, and verdict and judgment for defendant for costs only, errors at the trial in relation solely to plaintiff's cause of action are immaterial. *Mason v. Mason*, 102 Ind. 38, 26 N. E. 124.

- (z) *If plaintiff not entitled to recover, receiving incompetent testimony from defendant not ground to reverse a judgment for defendant.*

If the plaintiff is not entitled to recover in a proceeding, receiving incompetent testimony from defendant is not ground to reverse a judgment for defendant. *Cotton v. Ashley*, 13 O. C. C. 535, 7 O. C. D. 242.

- (a-1) *Judgment on conflicting evidence affirmed.*

Where the evidence is conflicting, the judgment should not be reversed if the court can see, from the whole record, that justice has been done; the court should interfere only to prevent a plain perversion of justice. *Moore v. Shoaff*, 51 Ill. App. 76; *Jenkins v. Collier*, 37 Ill. App. 256, affm'd, 138 Ill. 634 (Cf. *Barrow v. Barrows*, 138 Ill. 649); *R. Co. v. Macon*, 8 Fla. 299.

- (b-1) *Where proper evidence abundantly sustains judgment, incompetent evidence is harmless.*

Where, from the record it appears, in a proceeding in

equity, that the chancellor received and considered incompetent evidence, the court will consider all the proofs, and reverse the decree only where, rejecting that evidence, the decree is left without sufficient evidence to support it. *Keithly v. Wood*, 47 Ill. App. 102; *Bryant v. R. Co.*, 137 Ala. 488, 34 S. 562; *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782, 42 Ga. 308.

(c-1) *Judgment properly rendered for failure of evidence will not be reversed for misnomer in calling it a judgment on the pleadings.*

Judgment properly rendered for failure of evidence will not be reversed for misnomer in calling it a judgment on the pleadings. *Stoddard v. Burge*, 53 Cal. 394.

(d-1) *Incompetent evidence will not invalidate a judgment where prevailing party also introduced an instrument which entitled him to judgment, notwithstanding the incompetent evidence.*

Incompetent evidence will not invalidate a judgment, where the prevailing party has introduced an instrument which entitles him to judgment, although he has introduced the incompetent testimony. *Stetson v. Bank*, 2 O. S. 167.

(e-1) *Judgment affirmed, though preponderance of evidence appears to be against it.*

If the record contains evidence on which the verdict can be orderly and reasonably based, it should not be set aside though there is other and adverse testimony which, as it appears in the record, seems to the court of appeals to preponderate. *R. Co. v. Woolridge*, 72 Ill. App. 551; *R. Co. v. Backes*, 35 Ill. App. 375; *Chese v. Beal*, 83 Tex. 333.

(f-1) *Suspicion of fraud insufficient to warrant disturbing the judgment.*

The fact that the evidence, as it appears in the reviewing court, is sufficient to arouse suspicion of fraud against defendant in attachment, is not sufficient to warrant that court in disturbing a judgment discharging an attachment. *Bernhard v. Schwartz*, 22 O. C. C. 147, 12 O. C. D. 183.

(g-1) *On a trial without a jury, improper evidence is harmless where sufficient proper evidence supports the judgment.*

The admission of improper evidence, on a trial to the court without a jury, is harmless, where there is sufficient proper evidence on which to base the decision. *Rose v. Lewis*, 10 Mich. 483; *Bird v. Rope*, 73 Mich. 483, 41 N. W. 514; *Rogers v. Borchard*, 82 Cal. 351, 22 P. 907; *Dorsey v. Williams*, 48 Ill. App. 386.

(h-1) *Where the court directs the jury to disregard improper evidence, unless it would create a prejudicial impression which could not be eradicated, a judgment will not be reversed therefor.*

Where the court subsequently directs the jury to disregard evidence improperly admitted over the objection of a party, unless it was of such a character that the prejudicial impression could not be eradicated from the jury, a judgment will not be reversed. *R. Co. v. Cries*, 15 O. C. C. 398, 7 O. C. D. 632.

(i-1) *Although an answer be insufficient, if the evidence shows it to be true, it will not suffice to disturb a judgment for plaintiff.*

Where an answer is insufficient, the facts alleged in evidence not being sufficient to constitute a defense, the judgment for the plaintiff will not be reversed because

the evidence shows such answer to be true. *Freitag v. Burke*, 45 Ind. 38.

(j-1) *Irrelevant evidence immaterial, where it could not have influenced the awarding of the judgment.*

The admission of irrelevant evidence is not ground for reversing a judgment where it could not have influenced the determination. *Ellis v. Short*, 38 Mass. (21 Pick.) 142; *R. Co. v. City of Worcester*, 147 Mass. 518, 18 N. E. 409.

(k-1) *When evidence twice so determined by trial court the judgment will be affirmed.*

When the evidence has been twice considered in the same way by the trial court, the supreme court will not disturb such finding in the absence of manifest error. *Succession of Seymour*, 52 La. Ann. 120.

(l-1) *On question of fact weight given to court below who saw the witnesses and heard the testimony, judgment left undisturbed.*

Upon a question of fact weight should be given to the fact that the court below, having seen the witnesses, had a better opportunity to form a correct judgment as to the weight to be given to their testimony. *Snodgrass v. Nelson*, 48 Ill. App. 121.

(m-1) *A judgment will not be reversed because the judge was asleep for a few minutes during the hearing of the testimony.*

Where, during the trial of a case, the judge was asleep for four or five minutes and did not hear the testimony, and the counsel did not disturb him, but proceeded with the examination, and after the judge awoke failed to call his attention to the fact that testimony had been given while he was asleep; but as it did not appear what tes-

timony was given the judgment will not be reversed. R. Co. v. Anderson, 93 Ill. App. 419, judgm't affm'd, 193 Ill. 9, 61 N. E. 999.

(n-1) *A correct judgment will not be reversed for remarks of the judge.*

A correct judgment will not be reversed for remarks of the judge. Hibberd v. Smith, 39 Cal. 145, 148.

(o-1) *Judgment for defendant rendered erroneous charges on the measure of damages immaterial.*

In a suit to recover damages for the breach of a special warranty on a sale of millet seed, the evidence was conflicting as to whether there was a warranty, and as to whether the seed was good or not, and the jury returned a verdict for the defendant. Held, that all instructions as to the measure of damages are immaterial. Simpson v. Baxter, 41 Kan. 540, 21 P. 634.

(p-1) *Judgment for defendant rendered refusal to instruct on the subject of partial failure of consideration harmless.*

The court having charged the jury that unless the defendants sustained their plea of total failure of consideration, there should be a verdict for the plaintiff for the full amount sued for, and the jury returned a verdict in favor of the defendants, the plaintiff will not be allowed to complain that the court did not submit instructions to the jury on the subject of partial failure of consideration. J. Crouch & Son v. Spooner (Ga. App.), 72 S. E. 61.

(q-1) *Judgment sustainable on two grounds, error in instructions as to one immaterial.*

Where an attachment was based on two separate and distinct grounds, on each of which issue was taken, and

a special finding was made in favor of plaintiff, it is immaterial that error may have been committed in the instructions as to one, there being no error shown as to the other. *Dunham v. Holloway*, 3 Okl. 244, 41 P. 140, affm'd, *Holloway v. Dunham*, 170 U. S. 615, 42 L. ed. 1165.

(r-1) *Where evidence preponderated in favor of defeated party, judgment affirmed if instructions are accurate on material questions.*

Where the evidence preponderates in favor of the defeated party, the judgment will be affirmed only in case the instructions upon material questions were accurate. *Parmly v. Farrar*, 169 Ill. 606.

(s-1) *Where the verdict of the jury concurs with the law and the facts of the case, a judgment will not be reversed for erroneous charge or refusal to give an appropriate one.*

When the verdict of a jury accords with the law and the facts of the case, a judgment will not be reversed on account of an erroneous charge to the jury or a refusal to give instructions which may be appropriate, and especially when the correct charge should produce the same result upon the facts. *May's Ex'rs v. Seymour*, 17 Fla. 725; *Gibbons v. Dillingham*, 10 Ark. 9; *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 73 N. E. 906; *Amick v. O'Hara*, 6 Blackf. (Ind.) 258; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *Bronson v. Dunn*, 124 Ind. 252, 24 N. E. 749.

(t-1) *Inconsistent defenses and instructions thereon harmless when judgment is for plaintiff.*

Where the jury found for plaintiff, error in allowing inconsistent defenses to stand in the answer and in instructions; such defenses are harmless. *Deuchler v. Insurance Co.*, 51 Mo. App. 154.

(u-1) *Instruction on abstract proposition, or on point not in the case, will not disturb the judgment.*

If an erroneous charge is given on an abstract proposition, or on a point not in the case, and the verdict is supported by proof in the case, the judgment will not be disturbed. Meredith v. Kennard, 1 Neb. 312; Allen v. Saunders, 6 Neb. 436.

(v-1) *If on conceded facts it was clearly right, the judgment will not be reversed for wrong reasons or erroneous charge.*

A right verdict based on wrong reasons or on an erroneous charge will not be set aside if, on the conceded facts it was clearly right. King v. Herb, 18 O. C. C. 41, 9 O. C. D. 270; Fowler v. Waller, 25 Tex. 695; Johnson v. Grainger, 51 Tex. 42.

(w-1) *A judgment will not be reversed or new trial granted on account of disregard by the jury of an erroneous instruction, which clearly appears to have been without injury to appellant.*

A judgment will not be reversed or a new trial granted on account of disregard by the jury of an erroneous instruction which clearly appears to have been without injury to the appellant. Edwards v. Wagner, 121 Cal. 376, 53 P. 821.

(x-1) *A judgment will not be reversed for a clerical error.*

A judgment will not be reversed for a clerical error as to a single word in an instruction, where the meaning is so plain as not to be misunderstood. R. Co. v. Helmericks, 38 Ill. App. 141; Cf. Paul v. Conwell, 51 Ill. App. 582.

(y-1) *A judgment will not be reversed for erroneous instructions immaterial to the issues.*

A judgment will not be reversed because of erroneous :

instructions given on points wholly immaterial to the issues. *U. S. v. Wright*, Fed. Cas. No. 16775 (1 McLearn 509); *Wren v. Parker*, 57 Conn. 529, 18 A. 790, 6 L. R. A. 80; *Thurston v. Lloyd*, 4 Md. 283; *Garner v. Collins*, 1 Miss. (Walk.) 518; *Moseby v. Gainor*, 10 Texas 393; *Bowren v. Campbell*, 5 Wis. 187.

(s-1) *Entry of judgment on findings, without formal entry of a general verdict.*

Where issues of fact were treated by both parties as the only matters in dispute, and there was no conflict of evidence on any other questions. The court, without objection, submitted such issues to the jury for special findings, stating that a general verdict would be directed, as might be authorized by such special findings. The findings were all in favor of plaintiff. Held, that the entry of the judgment for plaintiff, without the formal entry of a general verdict was harmless error. *Bixby v. Wilkinson*, 27 Minn. 262, 6 N. W. 801.

(a-2) *Where objectionable evidence and findings are unnecessary to sustain the judgment.*

Where objectionable evidence and findings based thereon are not necessary to sustain the judgment rendered, error in admitting such evidence and making such findings is harmless. *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249.

(b-2) *A mere difference between court and jury as to motives, where verdict involves forfeiture of entire debt for usury and ultra vires insufficient to reverse judgment.*

A difference of opinion between the jury and the court as to the motives and intent inferred from circumstantial evidence, where the verdict involves the forfeiture of the entire debt, as for usury and ultra vires, is not sufficient

ground to set aside the verdict. *Abernethy v. Bank*, 5 O. S. 266.

(c-2) *Where, in replevin, it appears that the property has been lost or destroyed, so that a judgment for its delivery would be unavailing, judgment for damages only a mere technical error.*

Where, in replevin, it appears that the property has been lost or destroyed, so that a judgment for its delivery would be unavailing, the rendition of judgment for damages alone, without award and return, is at most a technical error which does not warrant a reversal. *Brown v. Johnson*, 45 Cal. 76.

(d-2) *In action brought by administratrix against surviving partner of decedent for an accounting, no advantage having been taken the judgment will be affirmed.*

Where, on a bill by the administratrix of the estate of a decedent, in a suit brought by her to set aside the final report of the surviving partner of the decedent, to set aside a sale made by him and to compel a further accounting, it appears that, though there were irregularities, there was no fraudulent or undue advantage taken, and it does not appear that any advantage would probably accrue by the opening up of the matter so settled, the judgment will be affirmed. *Corbin v. Hill*, 39 Ind. App. 651, 79 N. E. 377.

(e-2) *Erroneous judgment de bonis testatoris not reversible error.*

In assumpsit against executors for money had and received to plaintiff's use, not by the testator, but by defendants, on the plea of non-assumpsit, a verdict being found that defendants did assume in manner and form, etc., a judgment de bonis testatoris is perhaps erroneous,

but if defendants appeal, they can not take advantage of such error to reverse the judgment, it being for their benefit that it should be entered in that manner, and plaintiff not being dissatisfied. *Martin v. Stover*, 2 Call (Va.) 433.

(f-2) *Judgment being clearly right, incorrect evidence or instructions are harmless.*

A verdict which is undoubtedly right upon the evidence; i. e., so clearly right that, if it were the other way, it should be considered contrary to the evidence, should not be set aside because of the admission of improper evidence or the giving of incorrect instructions. *Robinson v. Imperial Silver Mining Co.*, 5 Nev. 44; *Coulie v. Chedia*, 6 Nev. 222; *Sullivan v. Iron Silver Min. Co.*, 143 U. S. 431, 12 Sup. Ct. 535, 36 L. ed. 214; *Webster v. King*, 33 Cal. 348; *Fisher v. Bank*, 22 Col. 373, 45 P. 440; *Atwood v. Partree*, 56 Conn. 83; *Tomkins v. Female College*, 30 Ga. 485; *Jamison v. Perry*, 38 Iowa 14; *Whiting v. Root*, 52 Iowa 292; *Cheeny v. Cummings*, 3 La. Ann. 163; *Kimball v. Hildreth*, 90 Mass. (8 Allen) 167; *Nelson v. Ferros*, 30 Mich. 497; *Gillam v. Boynton*, 36 Mich. 236; *Burday v. Dunbar*, 5 Minn. 444 (Gilfillan 362); *Wieland v. Shillock*, 23 Minn. 227; *Given v. Williams*, 27 Miss. (5 Chusman) 324; *Tyler v. Larimore*, 19 Mo. App. 445; *State, ex rel. Jones, v. Jones*, 131 Mo. 194, 33 S. W. 23; *Carmody v. Hanick*, 99 Mo. App. 357, 73 S. W. 344; *State, ex rel. Muholland v. Smith*, 141 Mo. 1, 41 S. W. 906; *Dube's Heirs v. Smith's Heirs*, 1 Mo. 313; *Williams v. Mitchell*, 112 Mo. 300, 20 S. W. 647; *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271; *Ginserg v. Leach*, 111 N. C. 15, 15 S. E. 882; *Porcheler v. Bronson*, 50 Texas, 555; *Mainwarring v. Templeman*, 51 Texas 205; *Goode v. Love's Adm'r*, 4 Leigh (Va.) 635; *Bank v. Napier*, 41 W. Va. 481, 23 S. E. 800; *Mather v. Hutchinson*, 25 Wis.

27; Davis v. Whitehead, 13 Wyo. 189, 79 P. 19, rehearing den. 79 P. 923.

(g-2) *Verdict and judgment in name of original plaintiffs, overlooking death of one and substitution of his executors, may be corrected and not ground for reversal.*

Under Code of Civil Procedure, sec. 475, providing that no judgment shall be reversed or affected by reason of errors and defects not going to the substantial rights, a verdict and judgment in the name of the original partners, plaintiffs, overlooking the death of one of these, and the substitution of his executors, may be corrected, and are not ground for reversal. Sanborn v. Cunningham (Cal. Sup.), 33 P 894.

(h-2) *Judgment for plaintiff will not be reversed because based on contract set up by defendant, and not on that set up by plaintiff, in spite of the variance.*

In an action against an initial carrier for injuries to live stock during transportation, plaintiff alleged an oral contract, but failed to establish such contract, and judgment in his favor was based on a written contract set up in defendant's answer. Held that, defendant having itself set up the written contract, and no complaint that the ruling of the trial court on its motion for a peremptory instruction was erroneous, on account of such variance, since its defense on that ground was upheld. R. Co. v. J. A. Wood & Co. (Ct. App. Ky.), 114 S. W. 734.

(i-2) *In action by joint obligor for contribution, several judgments against each, instead of against both, not prejudicial.*

In an action by a joint obligor on a note for contribution against two others, a several judgment against each

for his share, instead of a judgment against both, is not prejudicial to either defendant, and is not ground for reversal. *Murphy v. Gage* (Tex. Civ. App.), 21 S. W. 396.

(j-2) *Judgment entered in figures, instead of words, not ground for reversal.*

That the judgment was entered in figures, and not in words at length; held, a mere defect of form not prejudicial to defendant, and therefore furnishing no ground for reversal under pamphlet 1, 1899, p. 297, sec. 34. *East Orange v. Richardson*, 71 N. J. L. 458, 59 A. 897.

(k-2) *Where rectification of judgment would increase it, it will not be disturbed.*

Though the decree requires the payment of compound interest, the person bound thereby can not complain of the error, if its rectification would subject him to the payment of a still larger amount. *Eyler v. Hoover*, 8 Md. 1.

(l-2) *Judgment so faulty that it can not be executed not available to defendant as ground of reversal.*

Although a judgment for plaintiff in ejectment is so faulty, through a misdescription of the premises, that it can not be executed, defendant can not set up that fact as a ground of reversal. *Snyder v. Raab*, 40 Mo. 166.

(m-2) *Judgment against a defendant who had been dismissed from the case not cause for reversal.*

A suit against several was dismissed as to one, but before the case is decided as to the others, plaintiff filed a bill to review the decree and defendant answered. The case on the bill of review was not set for hearing, nor was the decree of dismissal set aside, but the original case was brought on to be heard, without noticing the

other case, and the court decreed against the defendant as to whom the bill had been dismissed. Held, this is not ground for reversing a decree which is right on the merits. *Beery v. Homan*, 8 Grattan (Va.) 48.

(n-2) *Judgment good as to one, but void as to another defendant, not reversible on behalf of the former.*

By the act of 1851-52, the provision of which is incorporated in the code, it is provided that no judgment or decree shall be reversed in the supreme court unless for errors which affect the merits of the judgment, decision or decree complained of. And under this rule a judgment will not be reversed which is valid as to one defendant but void as to another, upon the application of the former. The rule that the judgment is an entire thing, and therefore if void as to one party can not be allowed to stand as to any of the other parties is a purely technical one, and falls within such provision. *Bentley v. Hurxthal*, 3 Head (Tenn.) 379; *Williams v. Neil*, 4 Heiskel (Tenn.) 279, 281.

(o-2) *Judgment for plaintiff affirmed, where defendant in no event entitled to recover.*

Judgment for plaintiff affirmed, where defendant not entitled in any event to recover. *Doe v. Roe*, 20 Ga. 190; *Rolason v. Carson*, 8 Md. 208; *Insurance Co. v. Buffam*, 68 Mass. (2 Gray) 550; *Robinson v. R. Co.*, 73 Mass. (7 Gray) 92; *Houston v. Smythe*, 66 Miss. 118, 5 S. 520; *Lindsay v. Bank*, 115 N. C. 553, 20 S. E. 621.

(p-2) *That a judgment is by default, instead of nil dicit, is harmless error.*

That a judgment is by default, instead of nil dicit, is harmless error. *Elyton Land Co. v. Morgan*, 88 Ala. 434, 7 S. 249.

- (q-2) *Entering default judgment for want of appearance, instead of for want of a plea, was not reversible error.*

The entering of a default judgment for want of an appearance, instead of for want of plea, after the appearance is on file, is a mere irregularity, and does not justify a reversal. *Plaff v. Express Co.*, 251 Ill. 243, 95 N. E. 1089.

- (r-2) *Entering judgment severally against defendants, instead of jointly, was not prejudicial to them.*

In an action by a real estate broker against five several defendants jointly for commissions, plaintiff prays a joint and several judgment against defendants for \$10,000, it is not error prejudicial to defendants to enter separate judgments against each defendant for \$2,000 apiece. *Willard v. Carrigan*, 8 Ariz. 70, 68 P. 538.

- (s-2) *Where plaintiff offered no evidence, direction of verdict and entering judgment for defendant was not prejudicial.*

Where plaintiff refuses to offer any evidence in support of the allegations of his complaint, the direction of a verdict for defendant was not prejudicial, where the judgment disclosed upon its face that no testimony was introduced and no issue tried; and hence, that the judgment formed no bar to another action. *Webb v. Wegley* (N. D. Sup.), 125 N. W. 562.

- (t-2) *Where petition demanded \$218.57; judgment for \$308.69, ignoring confessed judgment for \$90.12 was not ground for reversal.*

Where, in an action for commissions the petition demanded a judgment for \$218.57, as balance due, and plaintiff before trial confessed judgment for defendant for \$90.12 demanded by way of counterclaim, and the

evidence showed that there was in fact due for commissions the sum of \$308.69, less the credit demanded, the action of the court in giving judgment for plaintiff for \$308.69, though irregular, was not ground for reversal, since defendant could only be required to pay the difference between the two judgments. *R. Morgan Coal Co. v. Louisville Coal & Coke Co.*, 141 Ky. 1, 121 S. W. 1054.

(u-2) *Where court sets aside its finding and files new and orders same judgment, the fact that it had no power to do so will not invalidate second judgment, if first sufficient to support it.*

Where the court sets aside its finding and vacates judgment thereon, and then files new findings and orders the same judgment, the fact that it may not have had power, of its own motion, to set aside such finding, will not invalidate the second judgment, if the first findings are sufficient to support it. *Krasky v. Wollpert*, 134 Cal. 338, 66 P. 309.

(v-2) *Signing a judgment on the day it was rendered, without waiting three judicial days, was harmless.*

The signing of a judgment on the day it was rendered, without waiting three judicial days, as required by law, held harmless, where the party accusing was not deprived of any substantial right. *Rohm v. Jallans*, 134 La. 913, 64 S. 829.

(w-2) *That one of two grounds on which the judgment is rendered is erroneous does not affect its validity.*

A judgment at law, rendered by the trial judge without a jury trial, based upon two distinct grounds, each sufficient in itself to support the judgment, will be affirmed, although one of the grounds may be erroneous. *R. Co. v. McDonough*, 97 Tenn. 255, 37 S. W. 15.

(x-2) *Judgment on general account unaffected by defeat of special promise.*

In an action against an estate to recover the value of the services rendered deceased as housekeeper and nurse. the complaint stated in the first paragraph a general account for the services, and in the second paragraph alleged a special promise by deceased to give plaintiff one-third of his estate for her services. Held, that the overruling of defendant's motion for judgment on the second paragraph was not prejudicial, where the evidence showed that plaintiff was entitled to judgment on the first paragraph for the amount stated in the verdict. Knight v. Knight, 6 Ind. App. 268, 33 N. E. 456.

(y-2) *Judgment on the pleadings, without testing the sufficiency of the answer by demurrer, not prejudicial error.*

Judgment on the pleadings, without testing the sufficiency of the answer by demurrer, is not prejudicial error, where no motion was made by defendant for leave to amend his answer or file some other pleading. Dailey v. Chappell, 12 O. C. C. n. s. 561, 21 O. C. D. 509.

(z-2) *To be set aside a judgment must clearly appear to be wrong.*

It is not sufficient that a judgment does not clearly appear to be right, but it must clearly appear to be wrong to authorize the court to set it aside. Jordan v. Imthurn, 51 Texas 276.

(a-3) *If there is any evidence in the record to support a judgment, if one had been entered for the plaintiff, he can not complain of error which the court committed either in admitting or rejecting testimony.*

If there is any evidence in the record to support a judgment, if one had been entered for the plaintiff, he

can not complain of error which the court committed either in admitting or rejecting testimony. *Downing v. Howlett*, 6 Col. App. 291, 40 P. 505.

(b-3) *Where any paragraph of complaint sufficient, an insufficient averment will not reverse the judgment.*

Where any paragraph of a complaint contains sufficient averments the appellate court will not reverse a judgment on account of the insufficiency of averments in other paragraphs. *Dice v. Morris*, 32 Ind. 283; *Kelsey v. Henry*, 48 Ind. 37.

(c-3) *Appellate court looks to the conclusion, and if judgment can be sustained by any reasoning it will be affirmed.*

The supreme court will not look to the reasons given by the trial court for its judgment, but will look solely to the conclusion, and if the judgment can be sustained upon any reasoning it will be affirmed. *Henry v. McNealey*, 24 Col. 456, 50 P. 37; *Miller v. Slaght*, 11 Col. App. 358, 53 P. 509; *McDonald v. McLeod*, 3 Col. App. 344, 33 P. 285.

(d-3) *Where plea was erroneously struck from the files, still, had it remained the result would have been the same, judgment sustained.*

Notwithstanding an error dismissing a party from the case and striking her plea from the files was technically erroneous, yet, if assuming all the allegations of the plea to be true, the final result must still have been the same as it was, the error was harmless and would not warrant disturbance. *Tom Boy Mines Co. v. Green*, 11 Col. App. 447, 53 P. 845.

(e-3) *Even if there is error, the judgment will not be reversed where no benefit would accrue to appellant.*

Where no benefit would accrue to appellant by a

reversal, the judgment will be affirmed, even though there is error. *Morris v. Hansom*, 2 Col. App. 154, 30 P. 139.

(f-3) *Although not reached by technically correct practice, having arrived at the correct result, its judgment will not be disturbed.*

By the requirements of the code, substance is to be more highly regarded than form. The court below, although not moving technically, in accordance with the better practice, having arrived at the result it would have properly reached, if the right motion had been interposed, its judgment will not be disturbed. *Turloch v. Belleville Pump & Skein Works*, 17 Col. 579, 31 P. 229.

(g-3) *The court will not disturb a judgment, in a suit for a resettlement of partnership affairs, when the defendant does not complain.*

Where, from the record of the plaintiff's appeal from a finding of a balance due him, in a suit for a resettlement of the partnership affairs, it does not clearly appear how the court adjudged him so large a finding, it will not be disturbed if defendant does not complain. *Mackey v. Magnon*, 12 Col. App. 137, 54 P. 907.

(h-3) *If there be no substantial errors the judgment may be affirmed without reference to the errors assigned with respect to immaterial issues or testimony.*

In trying a cause, without written pleadings, the material issues are to be gathered from the evidence, as the trial progresses, and thus irrelevant testimony is liable to be admitted; but if, in reviewing the record of such a cause, it is evident that the trial court committed no substantial error bearing upon such material issues, the judgment may be affirmed. without reference to errors

assigned with respect to irrelevant issues or testimony. *Parker v. Van Buren*, 20 Col. 217, 36 P. 900.

(i-3) *A judgment will not be reversed for error which works no injury, but unless it clearly appears that the error did not and could not have prejudiced the party's rights a reversal will be directed.*

The rule that a judgment should not be reversed when the error complained of works no injury, applies only when it appears so clearly as to be beyond doubt that the error did not and could not have prejudiced the party's rights, a reversal will be directed unless it so appears. *Smuggler, etc., Min. Co. v. Broderick*, 25 Col. 16, 53 P. 169.

(j-3) *If respondent is entitled to a judgment for some amount and recovered judgment for the whole amount sued for, and appellant insists that respondent must recover all or nothing, the court will not determine whether judgment was entered for a proper sum.*

If the respondent is entitled to a judgment for some amount and recovered judgment for the whole amount sued for, and appellant insists in his brief that respondent must recover the whole amount sued for or nothing, the court will not decide whether judgment was entered for a proper sum. *Moore v. Murdock*, 26 Cal. 515.

(k-3) *Where judgment could not have been otherwise errors disregarded.*

Where it appears that judgment could not have been different had errors not been committed, it will not be reversed. *Spencer's Est.*, 96 Cal. 450, 31 P. 453; *Dolbeer's Est. (Cal.)*, 86 P. 695; *Schouder v. Gray (Cal.)*, 86 P. 695.

(l-3) *Correct judgment will not be reversed though error appears on the record.*

A judgment which is right upon the whole case will not be reversed, though error appears upon the record. *Goodrich v. Fritz*, 4 Ark. 525; *Payne v. Bruton*, 10 Ark. 53; *Freeman v. Regan*, 26 Ark. 373.

(m-3) *False theory unimportant, when plaintiff entitled to recover on any theory.*

A judgment for plaintiff will not be reversed because the case was tried on a false theory, where plaintiff would have been entitled to succeed on any theory. *Gillespie v. Hendren*, 98 Mo. App. 622, 73 S. W. 361; *Sheafer v. Mitchell*, 109 Tenn. 181, 71 S. W. 86; *Loftis v. Loftis*, 94 Tenn. 237. 28 S. W. 1091.

(n-3) *Judgment for defendant affirmed when plaintiff not entitled in any event to a judgment.*

Where, on a trial by the court, without a jury, the finding of facts is insufficient to support a judgment for the plaintiff, with the defense stricken out entirely, the judgment for the defendant will not be reversed for any errors in ruling as to the validity of the special defense set up. *Shedden v. Dutcher*, 35 Mich. 10; *McCurry v. Wells*, 94 Cal. 485, 29 P. 877; *Nevitt v. Crow*, 1 Col. App. 453, 29 P. 749; *People v. Weiss-Chapman Drug Co.*, 5 Col. App. 153, 38 P. 334.

(o-3) *Where court renders judgment for the reconveyance of premises obtained by fraud, the grantees can not complain because there is no issue on which the part favorable to them can rest.*

Where a court renders a judgment for the reconveyance of premises, the conveyance of which was obtained by fraud, and that the grantor pay or credit the grantees

with a certain amount for care and maintenance received from them, the grantees can not complain of the judgment on appeal because no issue appears on which the portion favorable to them can rest. *Larkin v. Mullen*, 128 Cal. 449, 60 P. 1091.

(p-3) *Where nothing was claimed upon a paragraph of complaint, and no evidence offered in support of it, will not authorize a reversal of the judgment.*

Where nothing was claimed upon a paragraph of a complaint, and no evidence was offered in support of it, a trial without an issue upon it will not authorize a reversal of the judgment. *Hipes v. Cochran*, 13 Ind. 175.

(q-3) *Where a judgment infers a contract as though reformed, but without a previous order of reformation, reversal will not be granted.*

Where a judgment infers a contract as it should be when reformed, but without a previous order of reformation, reversal will not be granted. *Insurance Co. v. Boyle*, 21 O. S. 119.

(r-3) *Where both parties are guilty of laches and looseness as to time and manner of taking testimony, the judgment will not be reversed.*

When both parties are guilty of laches and looseness as to time and manner of taking testimony, the court will not be reversed for permitting it to stand, no substantial injury appearing. *Rise v. Cummings*, 51 Fla. 535.

(s-3) *In the absence of manifest error judgment will be affirmed.*

Where the issue before the supreme court on appeal involves only questions of fact, the judgment will be affirmed in the absence of manifest error. *Ayer v. R. Co.*, 47 La. Ann. 144.

(t-3) *Judgment will not be reversed where more favorable to appellant than justified by the evidence.*

A judgment will not be reversed because of erroneous instruction by the court, when the judgment is more favorable to the appellant than a fair construction of the evidence justifies. *McNally v. Shobe*, 22 Iowa 49.

(u-3) *Judgment erroneously including certain items was not sufficiently prejudicial to reverse the judgment.*

The fact that the lower court allowed certain items of an account, because it erroneously thought that no issue as to them had been offered, does not authorize a reversal of the judgment, where the evidence was sufficient to support the allowance of these items. *Dickinson v. Gray*, 10 Ky. L. R. 292, 8 S. W. 876, 9 S. W. 281; *R. Co. v. Same*, Id.

(v-3) *Judgment failing to include co-defendant not prejudicial.*

Where the record failed to show that defendant, against whom judgment was rendered in the lower court, would be entitled to contribution from his co-defendant, even in case he paid the judgment, and even if he would, and satisfactorily to settle the partnership and adjust equities, would probably be necessary to enable him to recover anything by way of contribution, failure of the court to render judgment against his co-defendant, even if conceded to be error, was not prejudicial to his substantial rights. *Williams v. Rogers*, 77 Ky. (14 Bush) 776.

Sec. 294. Premature hearing of a case.

(a) *Premature hearing of case where party complaining was not injured.*

The fact that the case was prematurely heard can not

affect the rights of a party who, on his own showing, was not entitled to the relief sought. *Vowell v. Conway*, 9 Ky. L. R. (abst.) 53.

Sec. 295. Record.

(a) *Presence in the record of undisposed of pleas was immaterial.*

The presence in the record of a plea which has been overlooked and remained undisposed of is immaterial, where the plea is not only without merit, but the subject matter thereof is covered by other pleas which have been properly disposed of. *Sammis v. Wightman*, 31 Fla. 10, 12 S. 526.

(b) *Where the record showed no issue upon which trial was had.*

Although the supreme court were not satisfied with the record for its informalities, yet, as there had been a trial by jury, as upon an issue, the record showing, however, no issue, and as they were satisfied that the merits had been reached, the court, by virtue of the act of assembly authorizing a disregard of form and the adherence to merits, affirmed the judgment. Act of 1809, 126, 10. *Ward v. Moore*, 6 Yerger (Tenn.) 490; *Wilson v. State*, 109 Tenn. 167, 70 S. W. 57, 58.

(c) *Incompetent evidence not reversible if, from the whole record, it could not have changed the result.*

The admission of incompetent evidence is not reversible error, if it is manifest, from the whole record, that it could not have changed the result, for it shows there was no prejudice. *Thayer v. Luce*, 22 O. S. 62; *Fuellen v. Coats*, 18 O. S. 343; *R. Co. v. Porter*, 32 O. S. 328; *Block v. Hill*, 32 O. S. 313; *Cordage Co. v. Cordage Co.*, 6 O. C. C. 615, 3 O. C. D. 613.

- (d) *Improper exclusion of record harmless where party offering it had proved every fact which the record, if admitted, would prove.*

The improper exclusion of a record is harmless, where the party offering it had proved every fact which the record, if admitted, would prove. *Lucas v. Brooks* (W. Va.), 85 U. S. (18 Wall.) 436, 21 L. ed. 779.

- (e) *Admission of record of a case in evidence controlling of the case at bar as an authority.*

The admission in evidence of the record of a case which is controlling on the case at bar as an authority, although not as an estoppel, is harmless. *Dunham v. Angus*, 145 Cal. 165, 78 P. 557.

- (f) *Record of baptism, not showing date of birth, harmless error.*

A record of baptism contained a statement of the time of birth of the person referred to in it, but none of the day on which the baptism itself took place. Held that, as such registry can only be relied on as evidence of the date of the baptism, and not of the date of the birth, its admission was harmless error. *Kabok v. Insurance Co.*, 51 Hun 639, 4 N. Y. Supp. 718.

- (g) *The circuit court erroneously ordering what shall be incorporated in a transcript of record not ground for reversal.*

A circuit court has no power to determine what shall be incorporated in a transcript of record sent up on a writ of error to the circuit court of appeals, and its action in directing the incorporation therein of testimony which it excluded as incompetent on the trial, and which is not contained in the bill of exceptions, is erroneous, but the error is harmless, and is not ground for a reversal

of its judgment. (N. C.) judgm't 110 F. 725 affm'd, West v. East Coast Cedar Co., 113 F. 737, 51 C. C. A. 411.

Sec. 296. Rehearing.

- (a) *Where an auditor refused to grant a rehearing after having drawn up his report, claiming want of power to do so, the judgment being right, though reason for refusing erroneous, will be affirmed.*

An auditor refused to grant a rehearing, after having drawn up his report, on the ground that he had no power to do so; held, on motion, if error, that although this was an erroneous supposition, yet, as the motion showed that the reasons for which a rehearing was claimed were insufficient, the auditor came to the correct result, and the judgment accepting his report ought not to be reversed. Welles v. Harris, 31 Conn. 369.

Sec. 297. Remittitur.

- (a) *Remittitur cured error in permitting filing of amendment.*

A remittitur of a portion of a judgment which is based on an amendment filed after the judgment was rendered, will cure any defect in permitting such amendment to be filed. Church v. Lacey, 102 Iowa 235.

- (b) *Remittitur cures admission of improper evidence.*

The entry of a remittitur for such portion of the verdict as is the result of the admission of improper evidence cures the error of its admission. R. Co. v. Beals, 50 Ill. 150; Hurlbut v. Hardenbrook, 85 Iowa 606.

- (c) *Error in stating sum for medical services cured by remittitur thereof.*

The admission of testimony of a physician that his charge for services to plaintiff was a certain sum, without

stating whether it was reasonable, was not prejudicial error, plaintiff remitting such sum from the judgment. *Perrette v. Kansas City*, 162 Mo. 238, 62 S. W. 448.

(d) *Error in refusing instruction against allowing item of account cured by remittitur of the amount.*

An alleged error in refusing an instruction against an item of account included in the judgment is obviated by a remittitur on error of the amount of that item. *Nixon v. Halley*, 78 Ill. 611.

(e) *Erroneous charge cured by remittitur.*

In an action by a tenant for unlawful dispossession, the damages to plaintiff's property were shown to be \$4,645. Plaintiff testified, without objection, that he also lost a judgment by the breaking up of his business. The court charged that plaintiff was entitled to recover both the damages to property and to the business. Defendant excepted to the latter part of the charge. Plaintiff obtained a verdict for \$8,695. The general term reversed the judgment unless plaintiff would stipulate to deduct so much as was "alleged for damages to plaintiff's business, to wit, the sum of \$4,050." In case it was stipulated, judgment as to the residue affirmed. Plaintiff stipulated, and judgment of affirmance as to the balance, to wit, for \$4,645 was entered. On appeal therefrom by plaintiff; held, that the charge excepted to was error, but the error was cured by the modification made by the general term. *Hayden v. Florence Sewing Machine Co.*, 54 N. Y. 221; *R. Co. v. Gilbert*, 51 Ill. App. 404; *Taylor v. Harris*, 68 Ill. App. 92; *Insurance Co. v. Crowell*, 77 Ill. App. 544.

(f) *Failure to charge cured by plaintiff deducting from verdict what was equivalent to the loss.*

If there was any error in a failure to charge on a

certain issue, it was cured by plaintiff's writing off, in accordance with an order of the court, as much of the verdict as could possibly have resulted from the failure to charge on such issue. *Brown v. Lathorn*, 115 Ga. 666, 42 S. E. 53; *Roundtree v. R. Co.*, 72 S. C. 474, 52 S. E. 231.

(g) *Injurious improper argument cured by remittitur.*

An excessive verdict, the result of improper remarks by a counsel, is not ground for reversal, where liability is clearly made out and the excess remitted. *R. Co. v. Shreve*, 70 Ill. App. 666.

(h) *Reducing verdict for plaintiff, without giving him option to accept or submit to a new trial, can not be objected to on appeal by defendant.*

In an action against a physician for malpractice in the use of the X-rays, he could not object on appeal that the court, on a motion for a new trial, reduced a verdict for plaintiff, without giving plaintiff the option as to a judgment for the reduced amount or having a new trial. *Shockley v. Tucker*, 127 Iowa 456, 103 N. W. 360.

(i) *That the verdict includes the value of property not asked for in the complaint is immaterial, where plaintiff permits to be taken from verdict a sum largely in excess of its value.*

That a verdict includes the value of property not declared for in the complaint is wholly immaterial, where plaintiff permits to be taken from the verdict a sum largely in excess of the value of such property. *Perkins v. Marrs*, 15 Col. 262, 25 P. 168.

Sec. 298. Satisfaction of judgment.

(a) *Satisfaction of judgment cured error in inserting value of property in replevin judgment.*

Error in inserting in a replevin judgment for plaintiff

the value of the property, because plaintiff was in possession, was harmless, in view of the subsequent satisfaction of the judgment by plaintiff. *Hoey v. Ellis*, 78 Minn. 1, 80 N. W. 693.

Sec. 299. Substantial justice.

(a) *Unimportant whether action brought at law or in equity when justice has been done.*

A new trial will not be granted, on the ground that plaintiff should have sought relief in equity, and not at law, where justice has been done. *Howard v. Aiken*, 3 McCord (S. C.) 467.

(b) *Failure to plead promise to pay unimportant where substantial justice has been done.*

In an action against a father for professional services rendered to his son, the court will not reverse a judgment for plaintiff because of the failure to plead a promise to pay, where it appears, from a consideration of the whole record, that substantial justice has been done. *Brown v. Ricketts*, 27 Ohio C. C. R. 269.

(c) *Immaterial issue unimportant where cause correctly decided.*

That the judgment was rendered in the court below upon an immaterial issue, where the record shows that it was correctly decided, will not be ground for reversal. *Dean v. Crenshaw*, 47 Texas 10.

(d) *Incompetent evidence will not reverse where substantial justice has been done by it.*

The admission of incompetent evidence will not justify a reversal of a judgment, where substantial justice has been done by it. *Traction Co. v. Sterling*, 9 O. C. C. n. s. 200, 19 O. C. D. 252; *R. Co. v. Kime*, 42 Ill. App. 272.

(e) *Errors in ruling on evidence or in instructions unimportant when judgment correct.*

Where, in an action against a railroad for injuries to a person struck by a mail pouch thrown from a rapidly moving train by a mail clerk, the unexcepted evidence showed that the person was so injured, and there was proof that the place where such person was when injured was a public street, and the circumstances disclosed excluded contributory negligence, no error of the court in its rulings on the admission or rejection of evidence or instructions would justify a reversal. *R. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356; *R. Co. v. Wilson*, 77 Ill. App. 603.

(f) *Unsound reasons disregarded where the result is correct.*

Where a motion for a non-suit was properly granted, it will be sustained even though the reasons given therefor by the trial court are not sound. *Cooper v. Romney* (Mont. Sup.) 141 P. 289; *R. Co. v. Keane*, 143 Ill. 172; *Campbell v. Powers*, 37 Ill. App. 308; *McKone v. Williams*, 37 Ill. App. 591; *Spring v. Barbe*, 43 Ill. App. 585; *Brown v. Gaston*, 1 Mont. 57, 62; *Insurance Co. v. Court*, 16 Mont. 278, 40 P. 600.

(g) *Substantial justice is higher than strict law or weight of evidence.*

If substantial justice has been done, the court would be unwilling to disturb a verdict, though as against strict law or the weight of the evidence. *Ludlow v. Park*, 4 O. 5.

(h) *Where substantial justice is done judgment unaffected by formal or harmless errors.*

Where the judgment does substantial justice, merely formal or harmless errors will not be regarded as

grounds of error. *Mt. Carmel v. Guthridge*, 52 Ill. App. 632.

(i) *Substantial justice will cause the court not to search for errors.*

Where the court can see that substantial justice has been done, it will not be astute in the search for technical errors upon which trifling litigation may be prolonged. *Jackson v. Crenek*, 34 Ill. App. 235.

(j) *Case erroneously tried before a jury, where the verdict is right, will not be reversed.*

A judgment in a case erroneously tried before a jury as an action at law will not be reversed, if the judgment is correct. *Baker v. Bicknell*, 14 Wash. 29, 44 P. 107.

(k) *Trifling errors ignored when justice has been done.*

Where, upon the whole record, the court is satisfied that justice has been done, it will not stop to consider trifling objections, especially where a recovery, if any were had, would be for a trifling sum. *White v. Stanbro*, 73 Ill. 575; *Ward v. Ringo*, 2 Tex. 420; *Thompson v. Thompson*, 12 Tex. 327; *Bradshaw v. Davis*, 12 Tex. 336; *Menifee v. Hamilton*, 32 Tex. 495.

Sec. 300. Technical exceptions.

(a) *A mere technical defense to the payment of notes unavailable to reverse a judgment.*

Where taking the notes, one payable to Bush, the other to Tuttle, for their several proportions of the balance due from McConnell, and not to the plaintiffs jointly, is such a variation of the contract with McConnell as to discharge the defendants, it is not necessary for this court to decide. If it were, the court would not grant a new trial and leave to plead, to enable the defendants to set up such a bar; they were granted de-

fendants only to let in a defense where substantial justice required it. The taking of these notes in this manner did not, in any way, injure them. The defendants covenanted with the plaintiffs that if they would deliver the notes to McConnell they would indemnify for any loss they might sustain by McConnell not paying over the proceeds of their sale. Relying on this the plaintiffs advanced their goods to McConnell, and he, of the proceeds of these goods, has kept back, and still keeps back \$1,216. Every principle of justice requires that the defendants should pay this sum to the plaintiffs. *Bush v. Critchfield*, 5 Ohio 109, 115.

(b) *Defective form in which the suit was brought.*

An action was brought on the name of A for the use of A and C, partners, to use of D, D being the real party in interest. The bringing of this suit in this form was defective, but being a formal defect, amendable by the court below, the court treated it as amended there and permitted the judgment. *Harley v. Insurance Co.*, 21 Weekly Notes Cases (Pa.), 403.

(c) *Suit by individual in importing corporate character a formal error.*

The prosecution of a suit by an individual banker in a name importing a corporate character, under which he carried on business, is merely a formal error, amendable in the court of original jurisdiction, and to be disregarded in the court of appeals. *Bank v. Magee*, 20 N. Y. 355.

(d) *Transposition of name of plaintiff for that of defendant will not reverse a judgment.*

Where the names of the parties are transposed, as that the defendant is named in the declaration as plaintiff, the judgment will not be reversed, if means of ascertain-

ing and correcting the error appear in the record. *Drummond v. Wright*, 1 Ala. 205.

(e) *Informality of the pleadings not cause for reversal.*

The judgment will not be reversed on error because the pleadings on which issue was based were informal. *Brinson v. Smith*, 7 Tenn. (Peck.) 194.

(f) *Irregular service and proceedings insufficient for reversal.*

Defendant pleaded in abatement, under oath, that he had not been served, and a general demurrer and a general denial to the merits, in a suit on a note. The court ordered the whole case to a jury, whereupon plaintiff read the note in evidence, and defendant read copies of the petition and citation served, and the cause was suspended until correct copies could be made out and served on the defendant. Four days after the correct copies were ordered to be delivered to the attorney of defendant, and the cause ordered for trial, to which defendant excepted on the ground that there had been no legal service of the copy five days before commencement of the term. Held, that though the plea imported no service, the real point of objection was the variance in the copies of the petition and citation, and that the plea, therefore, was merely a motion to quash for defective service, and that the action of the court was equivalent to an amendment which would have been proper; though there was some irregularity in the proceedings, it was not sufficient for a reversal of the judgment, there being a good cause of action and no defense to the merits. *Holstein v. Gardner*, 16 Tex. 114; *Anderson v. Briscoe*, 75 Ky. (12 Bush) 344.

(g) *Entry of suggestion of death, wrongly recorded, a mere informality.*

Although the entries of the suggestion of death of one

of the defendants, and that he had no personal representative, may be informal and stand in the wrong place in the record, after the entry of judgment instead of before it, these are informalities which do not affect the merits. *Britton v. Thompson*, 6 Yerger (Tenn.) 325.

(h) *Irregularity in the appointment of guardian ad litem not ground for reversal.*

The fact that a guardian ad litem for an infant, who was appointed after the decree of partition and before its entry, is not ground for reversal, though irregular. *Waples v. Waples*, 3 Houston (Del.) 458.

(i) *Refusal of plaintiff to comply with order to make his petition more specific.*

When defendant obtained an order requiring plaintiff to make his petition more specific, where it was sufficiently specific, defendant could not complain because plaintiff refused to comply and appealed therefrom. *McCrary v. Lake City Electric Light Co.* (Iowa Sup.), 117 N. W. 964.

(j) *Irregularities in a reference and proceedings thereon will not entitle appellant to a reversal.*

Irregularities in a reference and proceedings thereon will not entitle appellant to a reversal, unless he is prejudiced thereby. *Kellogg v. Putnam*, 11 Mich. 344; *Insurance Co. v. Whittemore*, 12 Mich. 427.

(k) *Refusal to strike cause from the calendar was not prejudicial.*

The error in refusing to strike the cause from the calendar is not ground for reversal unless it was prejudicial. *Killackey v. Killackey*, 156 Mich. 127, 120 N. W. 680, 16 D. L. N. 73.

- (l) *Untrue recital that the jury were sworn "to try the issue," a clerical error which will not cause a reversal.*

When the recital in the record purports that the jury was sworn "to try the issue," when the case is the execution of a writ of inquiry, the recital being necessarily untrue, is a clerical error which will not cause a reversal on appeal. *Hewitt v. Cobb*, 40 Miss. 61.

- (m) *Drawing names of jurors from a hat, instead of a box, will not disturb the judgment.*

The correct practice requires that the names of jurors be drawn from the box, but if they are drawn from a hat the verdict will not be disturbed. *Birchard v. Booth*, 4 Wis. 67.

- (n) *Error in not rejecting jurors shown to be property owners was immaterial.*

Error in not rejecting jurors shown to be property owners in the city, in a suit for negligence, is immaterial, when it appeared from the evidence that plaintiff was not entitled to recover. *Corlett v. Leavenworth*, 27 Kan. 673.

- (o) *Refusal to allow two defendants sued jointly more peremptory challenges was harmless.*

Where two defendants are being sued jointly, a refusal to allow him more peremptory challenges than if there had been but one defendant, if erroneous, is harmless, when it appears that neither defendant wished to challenge jurors selected after their peremptory challenges were exhausted. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.

- (p) *Irregularity in the oath administered to the jury.*

Appellee sued the firm of P. B. Vanden & Co., of

which it was claimed appellant was a member, on an account for merchandise sold and delivered. Appellant answered denying that he was a partner, and that the goods were sold and delivered to him or at his instance and request. This being the issue the court swore the jury to try the issue joined between plaintiffs "and the defendants, P. B. Vanden & Co." Held, that the substantial rights of appellant were not prejudiced by so slight an irregularity in the form of the oath, and the jury being expressly instructed that they could not find for appellee unless they believed that he (appellant) was a member of the firm of Vanden. *Vanden v. Thomas*, 7 Ky. L. R. (abst.) 447.

(q) *Reading pleadings to the jury, before explaining them, was not prejudicial.*

Reading pleadings before explaining them to the jury does not constitute prejudicial error. *Cin. Gas & Electric Co. v. Coffelder*, 31 Ohio C. C. R. 26.

(r) *Objection to the character of the logs to be furnished the extremity of technicality and disregarded.*

An objection was made that the evidence varied from the bill of particulars in the following instances: The bill of particulars attached to the declaration described the logs concerning which suit was brought as "round and crude saw-logs," while the evidence simply shows that the contract was for logs, without prescribing that they should be "round and crude." Held, that the court takes judicial cognizance that all logs are, for all practical purposes, considered round and crude, and that the objection is the extremity of technicality, and without substantial merit. *Bucki v. McKinnon*, 37 Fla. 391.

(s) *Purely technical objections to evidence unnoticed.*

The supreme court will not notice purely technical

objections to evidence; it did not affect the merits of the case. *State, ex rel. Weed, v. Meek*, 129 Mo. 431, 31 S. W. 913.

(t) *When controlling facts fully establish, trivial errors in the admission or rejection of evidence will not work a reversal.*

Trivial errors in the admission or rejection of evidence will not work a reversal, where the controlling facts are so fully established as to leave no question of the justice of the verdict. *Ellis v. Mills*, 99 Ga. 490, 27 S. E. 740; *Rheiner v. Barnard* (Tex. Civ. App.), 45 S. W. 962.

(u) *Where statement of facts in stenographic report of evidence was sent up with the record, trial judge's failure to file conclusions of law and fact not ground for reversal.*

Where the statement of facts embodied in the stenographic report of the evidence was sent up with the record, the trial judge's failure to file conclusions of law and fact afforded no ground for reversal. *Haywood v. Scarborough* (Tex. Civ. App.), 102 S. W. 469; *Olson v. Goerig* (Wash. Sup.), 88 P. 1017.

(v) *Reading to the jury the indorsements on the envelope containing a deposition was harmless.*

Reading to the jury the endorsements on a deposition envelope is harmless error, where it would not have the effect of challenging the validity of the taking of the deposition, or the legality of the return, or raise such issues, or cause the jury to discard the deposition, on the ground that it was illegally taken or returned. *R. Co. v. Walker* (Tex. Civ. App.), 106 S. W. 400.

(w) *Treating affidavit as an exception to a report of sale not a substantial error.*

Though regular exceptions should be filed to a report

of sale as a basis for motion to set aside the sale, yet the affidavit in support of the motion being capable of being treated as an exception to the sale, there was no substantial error in the trial court so treating it. *Mitchell v. Odewalt's Ex'r*, 33 Ky. L. R. 1007, 112 S. W. 612.

(x) *Technical inaccuracy in question immaterial when answer competent and proper.*

A judgment will not be reversed for technical inaccuracy in a question, where the answer was competent and proper evidence. *R. Co. v. Van Vleck*, 143 Ill. 480.

(z) *Error in refusing permission to counsel to use the instructions in illustrating his argument to jury was harmless.*

Error in refusing permission to counsel, in a civil trial to use the instructions in illustrating his argument to the jury was harmless, where it did not appear that he was unable to properly argue the case without them, or that he could not recall to the jury the substance of the charge given. *Storm v. City of Butte* (Mont. Sup.), 89 P. 726.

(a-1) *Error of calculation in money judgments will not reverse.*

Since Act of 1852, chap. 162, secs. 4, 5 (Code, secs. 2865, 1872), in causes brought into the supreme court by writs of error or appeal from money judgments or decrees, said court will not reverse for trivial errors of calculation merely, which do not affect the merits of the case, but will render such judgment as the court below should have rendered. *Edwards v. Greene*, 37 Tenn. (5 Sneed) 669; *Williams v. Bank*, 1 Coldwell 47; *Calanan v. Shaw*, 24 Iowa 441.

- (b-1) *Permitting plaintiff's counsel to state that he supposed a witness would give certain testimony, but on investigation found he would not, was not prejudicial.*

Where defendant's counsel charged plaintiff's counsel with having advised a witness subpoenaed by him to get out of town on a certain train, error, if any, in permitting plaintiff's counsel to state that he had received information that the witness would give certain testimony, but that on investigation he had discovered that the witness would not so testify, was not prejudicial. *Lockard v. Van Alstyne*, 155 Mich. 507, 120 N. W. 1, 15 D. L. N. 1132.

- (c-1) *Display of irritation by the court not reversible error.*

A display of irritation by the court will not work a reversal unless prejudice appears to have resulted. *Ladwell v. R. Co.*, 160 Ill. App. 596.

- (d-1) *Failure of the court to forbid comments on the pleadings, which were read and commented upon by counsel for both parties, not reversible error.*

Any error in not forbidding comments on the pleadings, which were read and commented upon by counsel for both parties, was not reversible, where the pleadings and comments added nothing to the weight of the other evidence. *Hodges v. Wilson*, 165 N. C. 323, 81 S. E. 340.

- (e-1) *Refusal of a proper instruction, by error of counsel in answering a question of the court, not sufficient to cause reversal.*

Where substantial justice has been done in the trial of the cause, it will not be reversed because of the refusal of a proper instruction, if the error in refusing the instruction is caused by an error of counsel in answering the question of the court. *Grace & Hyde Co. v. Strong*,

127 Ill. App. 336, judgm't affm'd, 224 Ill. 630, 79 N. E. 967.

(f-1) *Where the trial resulted properly, technical errors in instructions given or refused are unimportant.*

When from the overwhelming properly admitted proofs in a cause, the trial has resulted in the only way it could properly have done, alleged technical errors in instructions given or refused will not be considered by the appellate court, where such errors, if any could not properly have impelled a reversal. *Graham v. Hampton*, 56 Fla. 316.

(g-1) *Instructions will not be reviewed on account of their spirit and style.*

Instructions to the jury, which are not liable to mislead them as to their purport, the charges will not be reviewed with reference to their spirit and style, as bearing with severity against the party complaining of them. *McDonough v. Sutton*, 35 Mich. 1.

(h-1) *Defective arrangement of correct charge harmless error.*

If a general charge, taken as a whole, contains a correct statement of the law, the fact that it may be defectively arranged is not error. *Guerin v. Hunt*, 6 Minn. 375 (Gil. 260).

(i-1) *Clerical errors in instructions not ground for reversal.*

Clerical errors in instructions, readily discovered on reading the same, constitute no ground for reversal. *Shortel v. City of St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Am. St. Rep. 317.

(j-1) *Technically erroneous instruction on the measure of damages was not reversible.*

The giving of a technically erroneous instruction on

the measure of damages was not reversible error, where there was nothing to show that the jury returned a verdict for any different amount of damages on account of the misconstruction. *Kain v. R. Co.*, 29 Mo. App. 53.

(k-1) *Inadvertency in the use of the word "appeal" instead of "claim" did not mislead.*

Upon an application for a rehearing on the ground that the judgment was not in accordance with the opinion of the court; held, the seeming irregularity growing out of the use inadvertently of the word "appeal" in the closing part of the opinion instead of "claim." It was a simple inadvertency which could not and did not mislead anyone; the application is denied. *Clancey v. Clancey*, 7 N. M. 616.

(l-1) *Mere inaccuracy of expression by a trial judge is not ground for reversal.*

A mere inaccuracy of expression by a trial judge is not a ground of reversal, where the intended meaning is plain, and the inadvertence caused no injurious misunderstanding. *Johnson v. Roy* (N. J.), 112 F. 256, 50 C. C. A. 237.

(m-1) *Cause submitted to a jury, after a default judgment, is a mere irregularity.*

The submission of a cause to a jury after a judgment by default is an irregularity not available to defendant on error. *Allen v. Claunch*, 7 Ala. 788.

(n-1) *Verbal inaccuracy in a charge not calculated to mislead the jury not ground for reversal.*

Although the court in instructions made use of a purely technical word, it is not cause for a new trial, where there is no reason to apprehend that the jury did not understand it, and the complaining party makes no

request for an explanation. Insurance Co. v. Lewman, 124 Ga. 170, 52 S. E. 599, 3 L. R. A. n. s. 879; R. Co. v. Mirrett, 120 Ga. 409, 47 S. E. 908; Pickens v. R. Co., 54 S. C. 498, 32 S. E. 567.

(o-1) *Inaccuracy in an instruction inflicting no harm.*

The inaccuracy in an instruction will not reverse, where its meaning is indicated by a series of instructions given, and where the evidence is of such a character as to negative any inference of harm resulting. City of Gibson v. Murray, 120 Ill. App. 296, judgm't affm'd, 216 Ill. 589, 75 N. E. 319; Kennedy v. Sullivan, 34 Ill. App. 46; R. Co. v. Matthews, 48 Ill. App. 361.

(p-1) *An exception, without having made an objection, to an instruction, presents no question for review.*

An exception to an instruction, without having made an objection thereto, does not present any question for review. Yercy v. R. Co., 39 Mont. 213, 18 A. & E. Ann. Cas. 1201.

(q-1) *Error in instructing on issue not in the case not ground for reversal.*

Error in instructing on an issue not in the case is not ground for reversal, in the absence of a statement of facts to show that appellant was injured thereby. Winder v. Weaver (Tex. Civ. App.), 37 S. W. 376.

(r-1) *The expression in a charge, "if you believe from the evidence," while objectionable, is not usually ground for reversal.*

An instruction containing the expression, "if you believe from the evidence," though objectionable, is not ground for reversal, where it did not appear that prejudice probably resulted therefrom. Merrell v. Dudley, 139 N. C. 57, 51 S. E. 777.

(s-1) *Verbal inaccuracy in a charge, resulting from a slip of the tongue, not ground for a new trial.*

A verbal inaccuracy in a charge resulting from a "palpable slip of the tongue," is not ground for a new trial. *Turner v. Elliott*, 127 Ga. 338, 56 S. E. 434.

(t-1) *Instruction not prejudicial because using word "defendant" instead of proper word "plaintiff."*

Where no juror of ordinary intelligence would have been misled by the mistaken use of the word "defendant" in place of "plaintiff" in an instruction, an assignment of error thereon was not well taken. *Salina Mill & Elevator Co. v. Hoyne*, 10 Kan. App. 579, 63 P. 660.

(u-1) *Judge employing "defendant" for "plaintiff" in a finding, a mere clerical error.*

A clerical error in the use of the word "defendant" for "plaintiff" in a finding by the judge will be disregarded on appeal. *Davis v. Judd*, 11 Wis. 11.

(v-1) *Irregularity in the jury awarding recovery instead of the court.*

In a suit against a railroad company under Way. Statutes, p. 310, sec. 43. to recover double damages for the killing of stock, the supreme court will not reverse a case because double damages were awarded by the jury instead of the court, no harm resulting from such irregularity. *Seaton v. R. Co.*, 55 Mo. 416.

(w-1) *Irregularity in a verdict not prejudicial, if such as would have been rendered in the absence of error.*

Informality in a verdict rendered in accordance with a peremptory instruction is not prejudicial, if the judgment is such as would have been rendered if the error had not been committed, *judgm't 4 Neb. (unoff.) 745, 96 N. W.*

175, affm'd on rehearing, Heagney v. J. I. Case Threshing Machine Co., 4 Neb. (unoff.) 690, 99 N. W. 260.

(y-1) *Making bond for property levied on to sheriff, instead of to plaintiff, was an immaterial error.*

Where a cause is submitted to the court, on a case stated. and rightly decided on facts agreed, an irregularity in making the claimant's bond for the property levied on to the sheriff instead of to the plaintiff, was held immaterial. Parker v. Portis, 14 Tex. 166.

(z-1) *Improper transfer of cause from equity to law docket not ground for reversal.*

Improper transfer of a cause from the equity to the law docket, and tried to the court, is not ground for reversal, unless the supreme court on de novo consideration of the issues should find that a different result was required. Irwin v. Deming (Iowa Sup.), 120 N. W. 645.

(a-2) *Transfer of common law action to equity, after verdict for plaintiff, was not prejudicial to defendant.*

The transfer of a common law action to equity, after verdict for plaintiff, resulting in a judgment for the same amount as the verdict, was not prejudicial to defendant. L. & J. A. Stewart v. Blue Grass Canning Co. (Ky. Ct. App.), 117 S. W. 401, rehearing den. 120 S. W. 375.

(b-2) *Failure of appellant to file briefs in the trial court within the time prescribed not injurious to appellee.*

Appellee was not injured by appellant's failure to file briefs in the trial court within the time prescribed, where the case could not be reached for submission at the current term and ample time remained for the preparation and filing of briefs. Peoples v. Evans (Tex. Civ. App.), 111 S. W. 756.

(c-2) *Court filing conclusions of fact and law without request therefor is not reversible error.*

It is not reversible error for the court to file conclusions of fact and law, without having been first requested to do so by a party to the suit, where no showing is made as to any injury resulting therefrom. *Ryan v. Ryan* (Tex. Civ. App.), 114 S. W. 464.

(d-2) *Except compelled by law so to do, appellate court will not sustain technical exceptions.*

Where the judgment seems right, on the merits, the court will not sustain mere technical exceptions taken in the course of the trial, unless compelled by law so to do. *English v. Johnson*, 17 Cal. 108.

(e-2) *Technical errors must be shown to have been injuriously misleading to receive attention.*

Courts do not sit as literary critics, and therefore mere verbal inaccuracies, unless clearly shown to have been misleading, are not ground for reversal. *R. Co. v. Conway*, 8 Col. 1, 5 P. 142; *Water Supply Co. v. Tenney*, 21 Col. 284, 40 P. 442; *Ashmead v. Colby*, 26 Conn. 309; *Coats v. Barnett*, 49 Ill. App. 275; *Hanson v. Miller*, 44 Ill. App. 550; *R. Co. v. Wiczorek*, 51 Ill. App. 498; *Zielenski v. Remus*, 46 Ill. App. 596; *R. Co. v. George*, 145 Mo. 38, 47 S. W. 11; *Dejering v. Flick*, 14 Neb. 448, 16 N. W. 824; *Witt v. Ellis*, 2 Coldwell (Tenn.) 38; *Bentley v. Hurxthal*, 3 Head (Tenn.) 379; *Smith v. Gaus*, 4 Tex. 72; *Furhee v. Shay*, 46 W. Va. 736, 34 S. E. 746; *Bank v. Farwell* (Kan.), 56 F. 570, 6 C. C. A. 24, writ of error dis. 56 F. 539, 6 C. C. A. 30; *Howe v. Lemon*, 47 Mich. 544, 11 N. W. 379.

(f-2) *Inaccuracy of the form of the judgment immaterial.*

Where the judgment is substantially right, it will not be reversed because of want of accuracy in the form.

Latham v. Prather, 2 Ky. (Ky. Dec.) 123; Keams v. Rankin, 5 Ky. (3 Bibb) 88; Roberts v. Central Lead Co., 95 Mo. App. 581, 69 S. W. 630; Huddleston v. Garrott; 22 Tenn. (3 Humphreys) 629, 631; Stanley v. Crippen, 1 Head (Tenn.) 115; Pate v. Spotts, 20 Va. (6 Munford) 394; Rohrbaugh v. Bennett, 30 W. Va. 186, 35 S. E. 593.

(g-2) *Mere mistakes will be disregarded.*

The appellate court may disregard an indorsement of an erroneous title upon a motion for a new trial, it being without doubt that it was a mere mistake. Harris v. R. Co., 23 Mo. App. 328.

(h-2) *Inmaterial irregularities not affecting substantial rights.*

A judgment will not be reversed on account of errors committed upon the trial which do not affect the substantial rights of the party appealing. Martin v. R. Co., 7 Okla. 452, 54 P. 696; Koger v. Willmon, 12 Cal. App. 87, 106 P. 599; Snell v. Crowe, 3 Utah 26, 5 P. 522.

(i-2) *Errors as to boundaries of land, technical and not substantial.*

A small portion of the land which had always remained in the possession of the plaintiff was included within the boundaries of the land, for the recovery of which the circuit court rendered judgment. Held, a technical, not a substantial error, and not ground for reversal. Jones v. Phillips, 66 Tenn. (10 Heiskel) 562.

(j-2) *Mistakes of slight importance will not cause reversals.*

A case should not be remanded for a new trial, where it is merely conjecture whether the jury misapprehended the instruction, especially where the matter as to which

a mistake might have occurred, is of slight importance. *Sherman v Champlain Trans. Co.*, 31 Vt. 162; *Elgin v. Joslyn*, 36 Ill. App. 301; *Smith v. Means* (Mo. App.), 155 S. W. 454.

(k-2) *Clerical error in using "defendant" in a judgment, where there were more than one, a mere irregularity.*

The validity of a judgment against two defendants is not affected by error in entering it against them in the singular number, "defendant," instead of the plural, where the error appears to have been merely clerical. *Roach v. Blakey*, 89 Va. 767, 17 S. E. 228.

(l-2) *Erroneous official appellation disregarded as mere surplusage.*

The fact that judgment to an action on a note given to plaintiff as guardian of minor read as rendered in favor of plaintiff as "administrator," and the bond and citation in error also name him as "administrator," while the original petition, citation and note recite that he is guardian, will not necessitate a reversal of the judgment, since the words "administrator" and "guardian," being merely a *descriptio personae*, may be rejected as surplusage. *Morrison v. Hodges*, 25 Tex. Supplement, p. 176.

(n-2) *Reforming contract to express the real character of the employment was not prejudicial.*

Where an employer admits the employee named in a written contract was employed as general manager, he can not complain of a judgment reforming such contract so as to express the character of such employment to designate the capacity in the written contract, any error therein being without prejudice. *Blair v. Kingman Implement Co.* (Neb. Sup.), 117 N. W. 773.

(o-2) *Clerical irregularity was not prejudicial.*

Where the clerk of the court enters a submission and award in a pending suit under the title of the suit, and thereafter makes new entries showing separate arbitration proceedings as contemplated by statute, the irregularity, if any, is not prejudicial. *Silliman v. Carr* (Cal. Sup.), 113 P. 135; *Early & Clement Grain Co. v. Fite* (Tex. Civ. App.) 147 S. W. 673.

Sec. 301. Trials.

(a) *Trial without overruling demurrer to replication immaterial where replication is good.*

On demurrer to a replication, if the trial of the cause is had without expressly overruling the demurrer, the cause will not be remanded if the replication is good. *Phillips v. Dana*, 2 Ill. (1 Scam.) 498.

(b) *Trial had upon insufficient pleadings upheld.*

If the declaration presents no cause of action, going to trial upon the same would not support a verdict, and if the plea had no semblance to a defense, it might be wholly ignored, yet where it may be inferred that there was some attempt to state a defense, and the attempt recognized on the trial, the trial is not wholly nugatory, but the record will be examined as if the pleadings were in form. *Bullard v. Lopez*, 7 N. M. 624.

(c) *Forcing to trial case against corporation in the hands of a receiver, without allowing time to plead, not reversible error.*

Forcing to trial a consolidated case, arising from financial difficulties of a corporation in the hands of a receiver, without allowing the corporation time to plead, allowed by equity rules, is not reversible error, where the appointment of a receiver was with the assent of the

corporation and steps taken to bring the case to a speedy trial were acquiesced in by all the parties. *Valdes v. Central Altagracia* (Porto Rico), 225 U. S. 58, 56 L. ed. 980, 32 Sup. Ct. 654.

(d) *Proceeding to trial, without vacating former order staying proceedings in the case, not cause for reversal.*

In an action against B & C upon their joint note, the court, in 1861, made an order staying the proceedings, on the ground that C was in the military service, and after the enactment of laws 1862, chap. 92, and after the "Soldiers' Stay Law" of 1861 had been pronounced unconstitutional, plaintiff noticed the case for trial, and after B had filed an affidavit of merits, was permitted to proceed to trial against B's objections, without any order having been made to vacate the order suspending the proceedings. Held, that the court in proceeding to try, practically set aside its previous order, and it was not necessary to do so by a formal order for that purpose, and the judgment would not be reversed on that account. *Bacon v. Bicknell*, 17 Wis 523.

(e) *Rule limiting to two trials not applicable to courts of review.*

The rule of the practice act, which forbids the granting of more than two trials upon the same ground, has no application to the courts of review. *Parmly v. Farrar*, 67 Ill. App. 624, *Garry, J., dis.*, *R. Co. v. Alsdurf*, 68 Ill. App. 149.

Sec. 302. Variances.

(a) *Variance between precipe and declaration not ground on which to base a writ of error.*

The variance between the amount of the damages laid in the precipe and that in the declaration affords no

ground upon which to predicate a writ of error. *McKay v. Friebele*, 8 Fla. 21.

(b) *Objection to complaint unavailable when decree based on intervening petition; the variance is immaterial.*

An objection that the complaint to set aside an alleged fraudulent administrator's sale of land, defective for failure to allege that it was necessary to sell the land to pay debts was not material, where a mortgagee of the land, whose claim had been filed and allowed, intervened and prayed for the same relief, the decree, in so far as it affected the sale, being based on the petition in intervention, to which no objection was taken. *Celtic Sav. & Loan Ass'n v. Curtis*, 43 Ind. App. 363, 87 N. E. 660.

(c) *Variance between corporate name in contract and that pleaded affords no ground for reversal.*

That the contract sued on describes defendant corporation by a name different from that by which it is sued, affords no ground for reversal, where it is plain from the entire record that the contract was made with defendant. *Hamburgher Co. v. Levy*, 27 Ill. App. 570.

(d) *Uncertainty in complaint, where contract is alleged made with owner, while recital in notice of lien showed that it was made with the contractor, a variance which does not justify reversal.*

Where a suit by the material men against the owner to establish and foreclose a lien for materials, was tried on the theory that the law made a contract between the material men and the owner, the uncertainty in the complaint arising from the fact that it alleged that the contract was made with the owner, while the recital in the notice of lien showed that it was made with the contractor, did not justify a reversal. *Lucas v. Rea* (Cal. App.), 101 P. 537, judgment modified, 102 P. 822.

- (e) *Failure to reform petition to conform to facts proved was not prejudicial to defendant.*

Although the additional allegation ordered by the court for the purpose of making the petition conform to the facts proved, was not bodily inserted in the petition, which was perhaps the proper way, under Revised Statutes, sec. 3567, still such irregularity was not fatal to the judgment, and especially so, in view of the fact that no prejudice is perceived to have resulted to defendants, and of the various provisions of the statute in relation to errors and defects in pleading and the effect thereof. *Corrigan v. Brady*, 38 Mo. App. 649.

- (f) *Variance in the order of proof is immaterial.*

Where the consideration of a bill of exchange is in issue, evidence thereof is competent in rebuttal, and error in receiving it in chief is harmless. *Cashman v. Harrison*, 90 Cal. 297, 27 P. 283.

- (g) *Variance insufficient to reverse, where it is evident that defendant was neither harmed nor surprised.*

A judgment will not be reversed upon the ground of a variance between the allegations of the complaint and proof, where it is evident that defendant was neither harmed nor surprised. *Rio Grande, etc., R. Co. v. Rubenstein*, 5 Col. App. 121, 38 P. 76; *Outcalt v. Johnson*, 9 Col. App. 519, 49 P. 1058.

- (h) *Immaterial variance between allegations and proof.*

Reversal is not warranted by a variance between allegations and proof which are immaterial, for no one is misled thereby. *Alden v. Barbour*, 3 Ind. 414.

- (i) *Variance in the proof of immaterial allegations.*

A variance in proof of an immaterial allegation of the

complainant's bill is not ground for reversal. *Cronè v. Crone*, 170 Ill. 494.

(j) *Immaterial variance as to negligence from furnishing a rotten rope.*

Though in an employee's action for injuries, the theory of the complaint was that the negligence of defendant consisted in furnishing a rotten rope, the trial of the case on the theory that the rope became defective after use was not prejudicial to defendant, there being no evidence of an examination of the rope until after the accident, nor of any change in its appearance from the time it was first seen by any of the witnesses. *R. Co. v. Beale*, 42 Ind. App. 588, 86 N. E. 431.

(k) *In action for injuries to miner, variance between allegation and proof as to props was immaterial.*

In a miner's injury action, any error in admitting evidence of a custom to order mine props through the driver, because the complaint was grounded upon a violation of the Mining Act, which required requests by the miners for props to be made upon a blackboard at the mine entrance, was harmless, where the complaint alleged notice to defendant of the need of props in both ways. *Collins Coal Co. v. De Pugh*, 43 Ind. App. 648, 88 N. E. 317.

(l) *Immaterial variance between bill of particulars and the proof.*

Where there is a variance between the allegations of a bill of particulars and the facts proved, and especially found by the jury, is such that an amendment should be allowed to conform the bill to the proof, the judgment will not be reversed because of the variance when defendant has suffered no substantial injury. *Jung v.*

Liebert, 44 Kan. 304, 24 P. 474; Bentnalli v. Marshall, 10 Kan. App. 488, 63 P. 93.

(m) *Variance between petition and note sued on which did not injure defendants.*

Marion Hoover, sued as trustee upon a promissory note executed to Marion Hoover, trustee for Alice Parr. Held that, as the judgment obtained in this action would be a bar to an action brought by the plaintiff on the same note in his individual name, the defendants are not injured by the variance between the petition and the note sued on, and therefore can not complain. Bronger v. Hoover, 12 Ky. L. R. (abst.) 750.

(n) *Judgment not reversed for variance between allegations and proof where prejudice not sustained therefrom.*

Where the complaint is sufficient as against a general demurrer and supports the judgment, a variance between the allegations and the proof can not be deemed material where the appellant is not prejudiced thereby, and the judgment can not be reversed upon appeal upon that ground. Carter v. Rhodes, 135 Cal. 46, 66 P. 985; Nordstrom v. Corona City Water Co., 155 Cal. 206, 100 P. 242; Zeininger v. Snitzler, 48 Kan. 63, 28 P. 1007; Regan v. O'Reilly, 32 Cal. 11; M. E. Church v. Seitz, 74 Cal. 297, 15 P. 732; Ah Goon v. Tarpey (Cal.), 7 P. 188; Bassett v. Woodward, 13 Kan. 341; R. Co. v. Hundt, 140 Ill. 525; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Simmonds v. Cash, 136 Mich. 558, 11 D. L. N. 117, 99 N. W. 754; Wells v. Sharp, 57 Mo. 56; Lubker v. Grand Detour Plow Co., 53 Neb. 111, 73 N. W. 457; Burt & Co. v. C. Gotsian & Co. (N. D.), 102 F. 937, 43 C. C. A. 59, writ of cer. den. 179 U. S. 684; Tucker v. Fleming Mills Co., 13 Ore. 28; McDuffee's Adm'x v. R. Co., 81 Vt. 52, 69 A. 124.

- (o) *Material variance between pleading and proof that was not prejudicial.*

Where the variance between pleading and proof was material, there was no prejudice shown when the trial court held the case open for further proof by defendant, if surprised by the decision there was no variance. *Maloney v. Geiger Mfg. Co.* (N. D. Sup.), 115 N. W. 669.

- (p) *Variance between proof of express and implied agreement immaterial, defendant not having been misled.*

Under averments of a claim to recover on an implied agreement for services performed, proof of an express agreement held admissible, defendant not having been misled. *Fort v. Gooding*, 9 Barb. (N. Y.) 371.

- (q) *Variance between note in evidence and that described in the petition was without prejudice.*

The admission of a note in evidence varying from that described in the petition is error without prejudice, when the substantial rights of the defendant have not been prejudiced thereby. *Bank v. Eastman*, 34 Iowa 392; *Condon v. Pearce*, 43 Md. 83.

- (r) *Variance between note alleged and the written instrument proved was not prejudicial to defendant.*

Under a complaint alleging the making by defendant to plaintiff of a note described therein, an instrument in writing was offered in evidence bearing date and expressing the promise the contract alleged, but also containing certain other terms of agreement respecting the title to and possession of certain personal property. Held, that it not appearing that defendant was prejudiced, the variance might be disregarded under General Statutes, chap. 65, sec. 34, providing that a variance between the evidence and the pleading shall be disre-

garded as immaterial, unless the court is satisfied that the adverse party is thereby prejudiced. *Johnston Harvester Co v. Clark*, 30 Minn. 308, 15 N. W. 252.

(s) *Variance between allegation and proof remanded to permit party to amend his pleading to conform to the proof.*

When it appears that the variance has not misled the adverse party to his prejudice, this court, on appeal, will permit a remanding of the cause, with directions to permit the party to amend his pleading to conform to the proofs. *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637.

(t) *Variance between declaration and proof as to grist mill will not disturb the verdict.*

Where plaintiff declared for the value of lumber taken and materials furnished in the erection of a grist mill, millhouse and appendages, the proof showed that there was a sawmill building, and that it was attached to a grist mill, and the jury included in their verdict the value of the lumber and materials for the sawmill. It was held that the court would not disturb the verdict, it appearing that substantial justice was done, and the jury having, in effect, found the sawmill to be an "appendage." *Allen v. McNew*, 27 Tenn. (8 Hump.) 46.

(u) *Variance between insurance policy alleged and proved was not reversible error.*

In an action on a policy of insurance, the plaintiff alleged the insurance to be unconditional, while the policy admitted in evidence excepted liability for losses from certain specified causes. Held, that as such variance might have been cured in the court below and it appeared that the loss was not from any of the excepted causes, there was no reversible error. *Pencil v. Insurance Co.*, 3 Wash. 485, 28 P 1031.

- (v) *In action for the recovery of a horse, variance in the description immaterial.*

Where the jury, in an action to recover a horse, found for plaintiff, after a view of the animal, the verdict will not be disturbed because of variance as to the description of the animal. *Graves v. Davenport* (Col. Sup.), 100 P. 429.

- (w) *Variance which fails to connect both B and his wife with the contract with the owner, in proceedings to enforce mechanic's lien, was harmless.*

In a proceeding to enforce a mechanic's lien by a subcontractor who states in his notice of lien that B and his wife were the contractors with the owners, and that he made his contract with both of them, and the complaint, in an action to enforce the lien, alleges the same relations, a variance in proof which fails to connect both B and his wife with the contract with the owner and with the subcontractor is harmless, where there are no other liens resulting from the same transaction, and the jury might have found from the evidence that the contract with plaintiff was on behalf of B's wife, though made with B. *Nelson v. Hajek*, 121 N. Y. Supp. 1018, 67 Misc. Rep. 128.

- (x) *Verbal variance by court in quoting statutory definition of libel, not ground for reversal.*

A mere verbal variance in quoting the statutory definition of libel in a charge, to which the attention of the trial judge was not specifically called, and where he subsequently followed the words of the statute; held, not ground for reversal. *Turton v. N. Y. Recorder Co.*, 3 Misc. 414, 52 St. Rep. 398, 22 N. Y. Supp. 766, affm'd, 144 N. Y. 144, 63 St. Rep. 69; *Ellison v. Dunlap*, 22 Ky. L. R. 1495, 78 S. W. 155.

(y) *Variance will not reverse when full justice has been done.*

A variance is not ground for reversal, when the whole merits have been investigated and full justice done. *Briggs v. Evans*, 1 E. D. Smith (N. Y.) 192.

(z) *Instruction which was a variance was harmless.*

In an action against a street railway for personal injuries to a passenger, where the petition alleged, and the proof showed, that the plaintiff gave a signal to stop at one street, but that the car did not stop there but went on, an instruction requiring the jury to find that the plaintiff signalled for the car to stop at the next street, while a variance, was harmless. *Holland v. R. Co.*, 157 Mo. 476, 173 S. W. 995.

(a-1) *Immaterial variance in the form of a verdict in replevin.*

In an action of replevin, on the trial and before instructing the jury, the court asked the plaintiff to elect whether he would take the property or its value in case he should have a verdict; the plaintiff elected to take the value, the property having been delivered to the defendants. Thereupon the court charged that, if they found for the plaintiff, they should "assess the damages at whatever sum may have been proven as the value" of the property, and the jury found for the plaintiff, and "assessed the damages" at a sum warranted by the proof of the value. Judgment having been entered for the amount of damages so found, defendants moved to vacate the judgment. on the ground that the verdict should have assessed the value of the property and not damages, which motion was denied. On appeal, it is held that the finding of the sum as "damages" was, under the circumstances and charge of the court, a finding of

the "value of the property," and the plaintiff having elected to take judgment for the value, was entitled to his judgment for the amount so found by the jury, and there is no substantial error in the judgment. *Jeffreys v. Greeley*, 20 Fla. 819.

(b-1) *Variance between pleadings and findings, but conforming to the evidence, received without objection, not reversible error.*

Variance between pleadings and findings, held not reversible error, where findings conformed to evidence received without objection. *Reid v. Warren Improvement Co.*, 17 Cal. App. 746, 121 P. 694.

(c-1) *Variance between allegation and proof as to sureties on arbitration bond was not prejudicial.*

The complaint alleged that both the defendants H & S signed the arbitration bond as sureties, but it appeared from the conditions of the bond, as set forth in the complaint, that S executed it as guardian of an infant party to the arbitration. Held, that a judgment against S would not be reversed for such variance, as it did not affect his substantial rights. *Brookins v. Shumway*, 18 Wis. 98.

(d-1) *Although there is a variance, it is not such as to warrant a reversal.*

Though, ordinarily, a variance would be ground for reversal, yet in this case, where there is no dispute about the facts, and the error, which is conclusive between the parties, could not be varied upon a new trial, and the finding made as to the value of the property, corresponded with the award except as to one item to the advantage of the appellant, there was no prejudicial error which requires a reversal of the judgment. *Foster v. Carr*, 135 Cal. 83, 67 P. 43.

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